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VOLUME THREE



NEW YORK UNIVERSITY PRESS

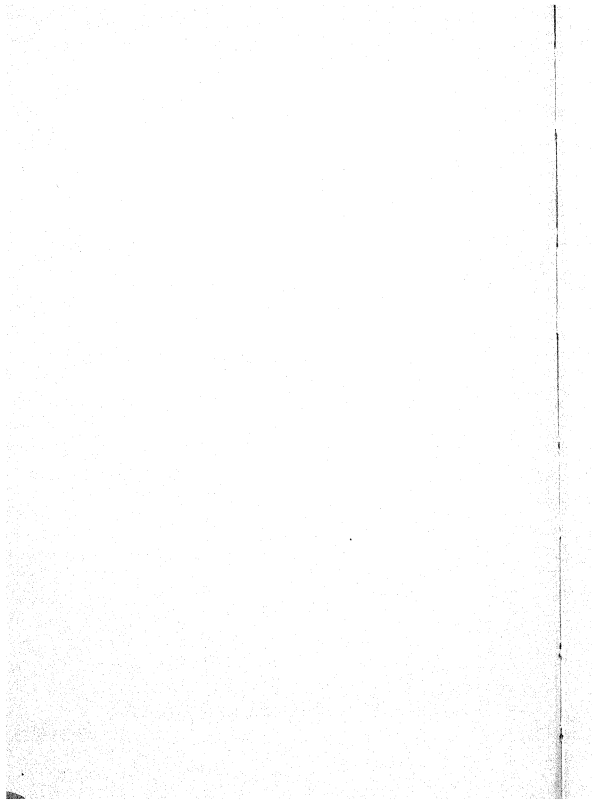
WASHINGTON SQUARE · NEW YORK

London: Humphrey Milford · Oxford University Press

1937

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Printed in the United States of America

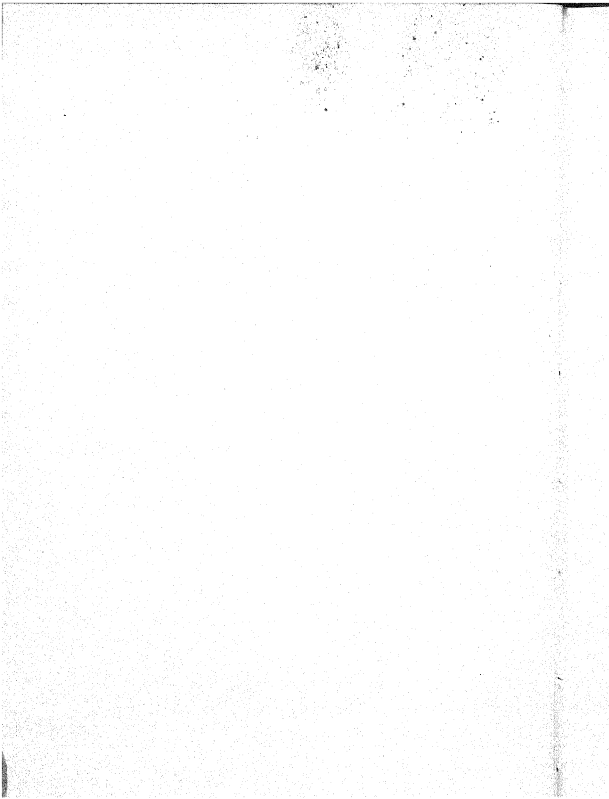
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VOLUME THREE

Private Law



THE RESTATEMENT OF THE LAW OF TORTS

PERCY H. WINFIELD

INTENTIONAL HARMS

IT MUST be stated at the outset of this article that the author of it is writing from the point of view of an English critic who has only the most superficial acquaintance with American law, and that his purpose is to compare the American law of torts, as he finds it in this Restatement, with the English law of torts, and to give the impression which the scheme makes as a whole upon a friendly alien.

First, at the risk of repeating what is probably known to every American lawyer, it is important to emphasize the exact aim of these Restatements and to investigate the material on which they are based. Their purpose is to present "an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years."¹ "The object of the [American Law] Institute is accomplished in so far as the legal profession accepts the Restatement as *prima facie* a correct statement of the general law of the United States."² Thus the rules of the Restatement are offered as something acceptable to the Supreme Court of the United States and to all other courts where they are not bound by some contrary rule due either to legislation or to the obligation to follow the decision of a higher court. The rules are forced upon nobody as a compulsory dose; that would have been impossible without legislation. They are in no sense intended to be a code in the scientific

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meaning of that word, and criticism based upon the assumption that they are would be not only unfair to the Institute but positively mischievous, for lawyers the world over would welcome almost any experiment in the unification of American law, however defective it might be, provided it were adopted by the American courts. The rules of the Restatements appear to be the result of an eclectic process and they may often vary from what is actually the law in any given state. In fact, arrangements have been made for the publication by each separate state of "Annotations" on the Restatement which will record local variations.³ It is presumably too early to say how far the Restatements already issued have been adopted in practice, for the oldest one—that on *Contract*—was completed only four years ago; but the measure of their recognition will be the measure of their success and any examination of them must be tempered by that reflection. The aim of the Institute is the intensely practical and desirable one of getting some sort of uniformity in the common law prevalent in some fifty different jurisdictions. Once that uniformity is achieved, the help and inspiration which American law will afford to other systems of law will be increased beyond computation, to say nothing of the benefits derived by the Americans themselves.

The two volumes before us are the first installment of the Restatement of the Law of Torts.⁴ There are still two or three to come to complete the topic, but these two are "in themselves complete works whose value does not depend upon having available at the same time the unpublished part. . . ."⁵ The ideal conditions of success in form of presentation of the matter (as distinct from the matter itself) would be, first, to select one man competent to do the task and, secondly, to give him power to consult other experts, but, thirdly, to put him under no obligation to accept their advice. The first two of these conditions were realized. The

competent—the supremely competent—man chosen was Professor Francis H. Bohlen. Some score of advisers were appointed to help him, most of them outstanding figures in teaching, practising, or administering American law. But how far the third condition was fulfilled we cannot be sure. It really depended on the extent to which Professor Bohlen felt morally bound to make concessions to his advisers when their opinions diverged from his own. Certainly in parts of the Restatement there are signs of lack of unity and compactness in form, however much the substance may represent the highest common factor of the legal rules prevalent in the various states.⁶ A minor point is that there ought to have been more cross references in the two volumes; as it is, one is apt to stumble by mere accident on matter in volume II which is relevant to that in volume I. The “reasonable man,” for instance, is domiciled in both.

First, we propose to review volume I, which deals with “Intentional Harms to Persons, Land, and Chattels.” It begins with definitions and we are instantly struck by the very limited scope and space given at this particular stage of the work to what may be described as general conditions of liability. The circumstances which negative liability cover less than half a dozen pages and the only one really defined is “accident” (or, as we style it, “inevitable accident”). The explanation is that other circumstances of this sort, *e.g.*, private defense, necessity, are examined and repeated in considering each specific tort. This may be either a concession to the practitioner who prefers to get the whole law of each separate topic aggregated under that topic, or it may have been due to the exigencies of draftsmanship. Whatever be the reason, the result does not tend to conciseness. Taking the definitions as we find them, it might have been indicated more clearly that “act” includes “omission,” and “interest” certainly requires the explanatory note attached to the definition of it. In

fact, throughout the work the comment upon the sections might often have been dignified with the heavier type given to the sections, whose phraseology sometimes verges on the obscure.

The definition of "tortious conduct" as conduct "of such a character as to subject the actor to liability under the principles of the law of Torts" (Section 6) had better be regarded as an implied admission that the draftsmen decline to give any definition of liability in tort, but prefer to notify their readers that they have at least pondered on the possibility of doing so. With the "reasonable man" they have been more explicit. He is a man of "normal acuteness of perception and soundness of judgment" in the actor's position (Section 11).⁸ With "intention" they have not been explicit at all—a notable omission in the light of the title of the volume. Legal causation (more familiar to us as "remoteness of consequence" or "remoteness of damage") is referred to in Section 9 and fully treated as to intentional injuries to personality, land, and chattels in Sections 279-280 and as to negligent injuries in volume II, Sections 281, 432-462. This arrangement is rather awkward, for in spite of the distinctive titles given to the two volumes there is a certain amount of overlap in the treatment of intentional and of negligent injury. As to intended wrong, the defendant has caused it if what he does is a substantial factor in bringing about harm of the type that he intended; and it is a substantial factor even if it appears afterwards that the harm is of a highly extraordinary character or if the injury is brought about by the intervening negligent, tortious, or criminal act of a third person. The last part of this rule looks severe, but it is subject to the limitation that the harm must be of the type intended by the original tort-feasor. If I give *A* a trifling cut and *B*, a surgeon, dresses the wound with a poison with the intent and effect of killing *A*, I have not caused *A*'s death unless indeed I intended it from the first. Again, what the defendant did must have been a

"substantial" factor in the harm perpetrated. For all that, however, there is no doubt that a sterner view is taken of the consequences of intentional wrongdoing than in English law. According to Section 32, Illustration 4, *C* is liable for pointing a gun at a trespasser who was not only out of the line of fire when the gun was leveled at another trespasser, but whose very existence was unknown to *C*. With us such a consequence would almost certainly be too remote. But this is not the only example in the Restatement which leads us to agree with Professor A. L. Goodhart that "the punitive or moral element seems to be stronger in American law than it is in the English";⁹ not but what English law, like many another system, has passed through a period of the like severity in the course of its development.

The first group of torts treated are those of intentional harmful bodily contact. Here the conditions are identical with those in the old action of trespass for bodily harm, save for a salutary abandonment of the hairsplitting distinction between direct and indirect consequences.¹⁰ Mere touching will not create liability unless harm ensue, and this departs from the old common-law rule that trespass to the person is actionable *per se*.¹¹ Nervous shock is reckoned as an illustration of the tort of bodily harm rather than as a consequence of it;¹² our courts have not yet settled which it is, but they incline to the latter view.¹³ Emotional distress unaccompanied by physical illness is not in itself a ground of liability, although it may form an item in aggravating the damages consequent upon some unlawful act which has caused harm independently of such distress.¹⁴

A remarkable clause is Section 18, which makes tortious an intentional and offensive causing of a contact with another's person or with anything so closely attached thereto that it is customarily regarded as part of his person, *e.g.*, if *A* daubs with filth a towel which he hopes that *B* will use and which *B* actually does

use; nor need the plaintiff know of the contact at the time of its commission, *e.g.*, where *A* kisses *B* while *B* is asleep. This is a full and sensible exploitation of a principle that was certainly recognized on our side of the Atlantic nearly forty years ago,¹⁵ but to the possibilities of which our law is scarcely awake.

On assault, as distinct from battery, we are glad to notice, first, that "apprehension"¹⁶ of harm by the plaintiff is the word chosen instead of "fear,"¹⁷ and, secondly, that "assault" extends to pointing an unloaded gun at one who does not know it to be unloaded; our law ought to be, and probably is, the same, but the authorities are contradictory.¹⁸ In another respect American law seems to be less logical. It is not an actionable assault if *A* makes *B* fear that *A* will intentionally inflict harmful or offensive bodily contact upon *C*, no matter how closely *C* is connected with *B* by ties of blood or affection. The reason given for this is that liability for assault is a highly specialized idea (Section 26). In Section 313 there is a *caveat* that the Institute express no opinion¹⁹ whether or not anxiety or shock caused by *A* to *B*, because *A* has negligently involved *B*'s child or spouse in unreasonable risk, is tortious. It is odd that there should be a doubt as to the liability of *A* for mere negligence when it is definitely stated that there is none for intentional harm of this sort. English law is decidedly the other way so far as negligence is concerned,²⁰ and it is incredible that the defendant should be in any better position if his act were intentional.

Section 35²¹ favors the defendant in false imprisonment more than we do by exempting him from liability if he confines the plaintiff when in fact he had no intention of confining anybody; but this is watered down by limiting his immunity to cases of merely transitory or otherwise harmless confinement.²² Another point of difference is that it is not false imprisonment if the plaintiff did not know that he was being confined.²³ This is more acceptable than the rule adopted by the majority of the Court of

Appeal in *Meering v. Grahame-White Aviation Co. Ltd.*,²⁴ where an opinion was expressed that a person can be falsely imprisoned while he is asleep, drunk, mad, or unconscious. The reason given was that his captors might be boasting elsewhere that he is imprisoned, an argument relevant to defamation rather than to false imprisonment.

Section 43 appears to us to be too summary, especially in its Illustration 3. *A* and *B* are in a room. *C* has no reason to know and does not know of *B*'s presence in the room. *C* locks the door for the purpose of confining *A*. *C* is liable to *B*. No account is taken here of the possibility of founding the action on negligence alternatively to false imprisonment, or of the following defenses which might be pleaded: (a) accident; (b) remoteness of consequence; (c) mistake. It may well be that the draftsmen had good reasons for not allowing any of these defenses in the circumstances, but what are they? Sections 49-62, dealing with consent as a defense to invasions of personality, call for no general comment except congratulation to the Institute on avoiding the phrase *volenti non fit injuria*. In particular, fraud vitiates consent, but not if the mistake thereby induced is on a collateral matter, *i.e.*, one which does not affect the plaintiff's realization of the nature of the invasion inflicted upon him, but which leads him to assent to an invasion, the nature of which he knows, because he believes it is to his advantage to assent thereto.²⁵ This is a more certain and intelligible rule than our law can show. In criminal law we have reached the same result on less scientific grounds,²⁶ but it is doubtful whether this applies to civil liability.²⁷ The attitude of the Restatement toward assent to the perpetration of bodily harm that is criminal also deals with problems imperfectly covered by English law. Even here, assent negatives tortious liability unless the law makes the act criminal for the benefit of a particular class of persons unable to appreciate the consequences

of the act (*e.g.*, carnal knowledge of a girl below a particular age) and not solely for the benefit of the public.²⁸ It is impossible to state our own law exactly, but one suggests that it ought to be that the plaintiff can sue in tort, in spite of his assent to such an act, unless allowing him to do so would be contrary to public policy in general or would be a condonation of a breach of public morals or of public safety in particular.²⁹ That is admittedly wider than the law in the Restatement, but it seems to be more in consonance with the maintenance of public order.

Chapter 4 (Sections 63-111) is concerned with acts done in defense of oneself and of one's land and chattels. Its wealth of detail must connote a corresponding wealth of decisions in America on a topic which has certainly not attracted a vast amount of civil litigation in England. If we might hazard a reason for the difference, it perhaps lies in a much sterner repression, by our criminal law, of acts of violence than is apparent in some parts of the United States, with the natural consequence that acts of private defense are also subject to limitations more severe and less complicated.

Chapter 5 (Sections 112-145) covers the defenses of arrest for crime and prevention of it. A distinguished practitioner described the English law on this subject as "most unsatisfactory and—to private persons—almost a snare."³⁰ The criticism applies with nearly equal force to the American law as represented here. Not that it is the fault of the draftsmen. They had to put forward the law as they found it, and so long as the unfortunate layman has to guess at what "felony," "misdemeanor," and "breach of the peace" mean, so long will he run the risk of being punished by a criminal court if he fails to make an arrest when he ought to do so, and of being cast in damages in a civil court if he makes it when he ought not to do so. Both systems did right in grading crimes according to their gravity. Both made a cardinal blunder

in making this gradation a determinant not merely of the extent of liability of the person who commits the crime, but also of the liability of an innocent third person in a collateral matter.

The rule in Section 146 states concisely what is probably also our law on harm inflicted in obedience to military or naval orders. Section 153 settles a question of quasi-parental control which is still open in England. Suppose that a schoolmaster flogs a boy without undue violence for a breach of some school rule, although the boy's father has forbidden corporal chastisement or has given the boy permission to break the rule; is the schoolmaster liable for battery? Yes, according to Section 153, unless the school is one provided by the State, for then the schoolmaster is the delegate of the State and not of the parent.³² That seems to be a practical test capable of application even where, as in England, many schools are State-aided but are not State schools; for even then it would be possible to determine, on the facts, whether a master were a delegate of the State or not. The case of a boy who is the victim of contradictory orders from his parent and his schoolmaster has not yet arisen with us; at present the boy's only solace for his stripes is the Horatian reflection, "*Quidquid delirant reges, plectuntur Achivi.*"³³

In Chapters 7 and 8 (Sections 157-215) trespass to land and the defenses thereto are considered. In a single page possession of land is defined and commented upon (it is not quite the same as the definition of possession of a chattel; Section 216). No doubt a mass of questions on the meaning of the terms there used has arisen or will arise, but perhaps the Restatement is wise in leaving the courts to the decided cases for their solution. Intentional trespass remains actionable *per se*,³⁴ and it is possible to commit trespass to the airspace,³⁴ though mere entry of it by aircraft is not trespassory provided it satisfies conditions³⁵ closely resembling those laid down by our own Air Navigation Act.³⁶ Even involun-

tary and nonculpable entry that infringes any such condition is actionable, but only if it causes harm to the land or to a person thereon.³⁷ The reason for this strict liability, which is probably, but not certainly, the same as that under the Air Navigation Act, is that "at the present time the operation of air craft is an extra-hazardous activity."³⁸

More generally, "accident" (the "inevitable accident" of English law) is a defense to trespass unless the defendant were engaged in an extrahazardous activity,³⁹ and he is exempted even then unless harm resulted from the trespass. This rule applies to reckless or negligent, as distinct from intentional, trespass.⁴⁰ The distinction seems to be sound, but our own law does not draw it.

In the negation of trespass by consent⁴¹ the Restatement escapes the intricate tangle into which *Wood v. Leadbitter*⁴² and *Hurst v. Picture Theatres, Ltd.*,⁴³ have got the law about revocability of a license coupled with an interest. Section 171 (b) makes a license terminable by revocation of the licensor's consent, and it seems that if Wood, who has paid for his entrance to a grandstand in order to watch a horse race, or Hurst, who has paid for his ticket in order to see a cinema performance, is ejected without cause before his purpose is effected, he has no remedy in tort. This has the merit of being a clear rule, but whether it is a just one is another matter. Our law is probably the other way.

The Section⁴⁴ on the privileges accorded to "a patron of a public utility" exhibits a phraseology completely novel to the English lawyer. Such a person is one who is exercising his right as a member of the public to use the services of persons carrying on an enterprise for the accommodation of the public; e.g., common carriers, innkeepers, telegraph, gas and electric-light companies. The privilege of the patron in going upon the property of the public utility differs in detail rather than in principle from the privilege set up by the assent, express or implied, of any other kind of person to entry upon that person's land.

Section 195 expresses the rules regarding deviation from the highway with a clarity woefully lacking in our system, in which the leading textbooks make the jejune statement that deviation to adjoining land is permissible on the ground of necessity if the highway is foundrous. But the moment the law is probed deeper it appears to be very doubtful to what extent this is true. The paradox is that the better the roads of a country become the more uncertain will be the law regarding deviation, because there will be much less need of it, and in America rules which have been long forgotten (if they were ever known) in England have a practical application in undeveloped regions of the continent.

Section 197 leaves us with the odd distinction that while private necessity will warrant entry on the land of another to rescue a third person from death it is doubtful whether entry into another person's house for that purpose is excusable.

Trespass *ab initio* appears in the Restatement⁴⁵ with the limitation long established in our law—that mere omission to perform a duty will not make the licensee liable for this. Thus, apparently, the six carpenters⁴⁶ might refuse to pay their score in an American inn just as much as in an English inn without fear of becoming trespassers *ab initio*, whatever their contractual liability might be.

Several points of comparative interest suggest themselves in Chapters 9 and 10, dealing with interests in chattels, but in general these sections would be familiar to any English lawyer and so call for less comment. With Chapter 11, which ends the first volume and treats of causation, we have already dealt.

NEGLIGENCE

We now pass to volume II (*Negligence*), and there is no doubt that it ought to achieve success, for its authors have done their best with a topic, parts of which are almost intractable to scientific exposition. Let any English lawyer compare their efforts in point of arrangement with the unwieldly diffuseness of the pres-

ent edition of Beven on *Negligence in Law* and he will not hesitate long in stating his preference. Not but what there are blemishes in form and puzzles in substance in the Restatement. The sections in heavy type seem to us the weakest part of the work. Sometimes they use in definition the very word that they define. Sometimes they go into details that might well have been relegated to Comment or Illustration.⁴⁷ Sometimes they are so vague as to be mere introductory sentences that give no information of any theoretical or practical value.⁴⁸ Doubtless these faults are often atoned for by the Comment, so no substantial harm is done, but they give the Restatement an appearance of being afflicted with rickets in its infancy.

As our study is to be a comparative one, readers will pardon a summary of the English law of tortious negligence. According to the balance of opinion, negligence with us means two distinct things:

1. A method of committing some (but certainly not all) torts
2. An independent tort which sprang from the action upon the case for negligence and which may be said to have developed into the nominate tort of negligence during the earlier part of the nineteenth century

With respect to (1), negligence as a mode of committing a tort consists in conduct in which there is, on the part of the defendant, usually either no advertence or insufficient advertence to the nature of his conduct and/or its consequences. In this conduct, whether there is such inadvertence or even full advertence⁴⁹—though this is rare—there is at least no desire for all the consequences, and this distinguishes negligent from intentional harm. As noted above, this meaning is possible in some torts, *e.g.*, infringement of copyright, nuisance, defamation, but not in all, *e.g.*, deceit and (at any rate in current law) assault and battery.

With respect to (2), the ingredients of negligence as a tort are

(a) a legal duty on the part of the defendant to exercise care toward the plaintiff; (b) breach of that duty by conduct of the kind mentioned in (1) above; (c) harm resulting to the plaintiff as a consequence of that breach.⁵⁰

Such is the bare analysis of tortious negligence in English law and it is convenient to add to it an attempted analysis of causation, for this plays a large part both in our law and in the Restatement. It can be no more than an attempt, for exact statement in the present plight of the English authorities is impossible.

Down to 1921, the generally accepted rule was that a tort-feasor was liable only for such consequences as could reasonably have been foreseen. But the Court of Appeal in that year, in *Re Polemis*,⁵¹ expressed a preference for a view developed some fifty years earlier⁵²—that, while reasonable foreseeability of consequences might be the test for determining whether conduct were negligent in the first instance, it was irrelevant for the purpose of deciding whether the consequences of such conduct were too remote; and that once it is proved that the defendant is negligent he is liable for all the direct consequences of his tort. It was assumed by most writers on tort that *Re Polemis*, although it was a decision on negligence, was of general application in the law of tort, but very little notice of it was taken by the profession, possibly because it was only in exceptional circumstances that the defendant was any the worse off under the rule in *Re Polemis* than under the earlier law, for even after *Re Polemis* it was, of course, still law that consequences must not be too remote, and this was expressed by saying that any interruption in the chain of causation by a *nova causa interveniens* would make the consequence an "indirect" one and would therefore release the defendant from liability.⁵³ Moreover, a recent dictum in the House of Lords limits *Re Polemis* to the immediate physical consequences of negligent conduct,⁵⁴ and other dicta in the Court of

Appeal indicate that the "reasonable foreseeability" rule still applies regarding consequences in all cases of tort other than those in which the consequences are the immediate physical result of the defendant's wrongdoing.⁵⁵ But only the House of Lords can now tell us exactly what the law is.

Now on this analysis it is clear that the "reasonable man" is a ubiquitous person in negligence as a tort in English law. He appears (a) in the conception of duty, for the question whether a legal duty exists or not must be determined by the test of reasonableness;⁵⁶ (b) in the conception of breach of the duty, for there is no breach of duty unless the defendant has behaved unreasonably; (c) in the conception of causation (or consequences), at any rate until 1921 and probably even now in spite of *Re Polemis*. Nor is that all. It is obvious that, in ascertaining how a reasonable man would behave, we must take into account some, at any rate, of the likely consequences of his actions. Why is it unreasonable for a man to drive down a crowded street at fifty miles an hour? Because of the disastrous consequences to life and limb which are likely to ensue. Here the element of consequence appears in (a) and (b), although on the pure question of causation it falls under (c). Thus the reasonable man introduces a certain amount of inevitable confusion in the tort of negligence. He makes it impossible for an English lawyer to isolate causation (or, as he calls it, remoteness of consequence) in the compartment numbered (c) above; or to prevent the reasonable man from having a double domicile in (a) and (b) as well as a *pied-à-terre* in (c). There is plenty of evidence in the Restatement that the reasonable man pervades the American law of negligence in the same way, and to American law we are now ready to turn.

First, if I rightly grasp what is stated in the American *Corpus Juris*, the double meaning of negligence noticed above is perceived and applied in many of the state jurisdictions.⁵⁷ But it does

not appear in the Restatement, for if we look at Section 281 the "Elements of a Cause of Action for Negligence" are thus set out:

"The actor is liable for an invasion of an interest of another, if:

"(a) the interest invaded is protected against unintentional invasion, and

"(b) the conduct of the actor is negligent with respect to such interest or any other similar interest of the other which is protected against unintentional invasion, and

"(c) the actor's conduct is a legal cause of the invasion, and

"(d) the other has not so conducted himself as to disable himself from bringing an action for such invasion."

Here there is no hint of the dichotomous signification of negligence. It may well be that the draftsmen regarded this, like other aspects of the topic, as a matter better left to exposition in the law schools and the textbooks; or it may be that, having the practitioner and nobody but the practitioner in mind, they were more concerned in concentrating attention on the "action for negligence" than in dissecting the legal meanings of negligence.

Next, one asks what has become of the idea of legal duty? This is transformed into requisite (a) above—the interest invaded must be one protected (*i.e.*, protected by law)³⁸ against unintentional invasion. That is only the converse of saying that there must be a legal duty to take care.³⁹ And to the question, "What interests are thus protected?" the answer in effect is, "You will find them in the headings of the various chapters which deal with them." It is nowhere stated why these interests in particular are protected—that, after all, is a matter of legal ethics rather than of pure law—nor even who it is that selects them for protection, which is a matter of pure law. In English law the answer to the question, "Why is certain conduct the subject of a legal duty to take care, and who is it that settles whether or not there is such a

legal duty?" is, "There is a legal duty if the circumstances are such that a reasonable man in the defendant's position would show care, and it is the judge who must decide whether the circumstances are such that he can infer the duty." We believe that the trend of American law is to the same effect.⁶⁰ The Restatement no doubt approaches the matter by the different avenue of "protected interest," but the practical result appears to be the same.⁶¹

Section 281 (b) and the Comment and Illustrations attached to it seem to confuse two ideas. The subsection professedly deals with what is negligent conduct, but it mixes this up with causation, which is really appropriate to Section 281 (c). We have freely conceded that it is impossible to keep the two topics distinct,⁶² but here they are unnecessarily entangled. If I am driving my car in a street so carelessly that I collide with another car containing dynamite and the consequent explosion (a) shatters a window some way off, thus inflicting serious cuts on *B*, and (b) injures *C*, a foot passenger near the point of the collision, and (c) breaks windows in the building opposite the point of collision, thus injuring *D* who is working in the building, the question of my liability to *B*, *C*, and *D* is really one of remoteness of consequence. But the Comment of the Restatement sets up a confusing division of persons into (a) the particular class to whom my conduct created a recognizable risk of harm; this includes *C*, who can therefore recover damages from me; (b) other particular classes, injury to whom I could not have reasonably contemplated; these include *B*, who therefore cannot recover damages from me. If this is an exposition of the difference between reasonable and unreasonable conduct it is artificial; if it is an unconscious application of the theory of causation, it is equally artificial. And, even allowing for the unsatisfactory state of the law with which the Institute had to deal, it is suggested that some-

thing less puzzling for the practitioner (for whom the Restatement is intended) might have been evolved. As Professor A. L. Goodhart has pointed out, this subsection must mechanize the law and give juries, who in America are allowed more authority in deciding legal questions than they are in England, some highly technical problems.⁶³

Section 281 (b) states that the actor must be negligent, and Section 282 amplifies this by saying that "negligence is any conduct, except conduct recklessly disregarding of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm." The segregation of recklessness, which is examined in Sections 500-503, is due to the much lower degree of care which is owed in some of the states to trespassers or to gratuitous licensees. Negligence is also distinguished from so-called "absolute liability," which is to be treated in volume III.

Unless the actor is a child or an insane person, the standard of conduct fixed for him in the law of negligence is that of a reasonable man in the like circumstances.⁶⁴ That is the rule with us, for, although the Restatement superficially distinguishes the lunatic from normal people, a *caveat* leaves the exact nature of the distinction as uncertain as it is in English law.⁶⁵

Although the explanation of causation referred to in Section 281 (c) as a requisite of liability in negligence appears at a later point in the book we shall find it more convenient to reproduce its substance here. Section 431 postulates as a leading rule that the defendant's conduct must be "a substantial factor"⁶⁶ in bringing about the harm. Section 433 explains that, in determining what is "substantial," regard must be had to:

"(a) the number of⁶⁷ other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

"(b) whether after the event and looking back from the harm to

the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm;

"(c) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

"(d) lapse of time."

Section 435 makes foreseeability of the harm immaterial. In spite of this, Professor Goodhart thinks that, although foreseeability is expelled with a pitchfork by Section 435, it nevertheless returns by way of Section 433 (b) *supra*, because the defendant is not liable if the harm were highly extraordinary, and harm which is highly extraordinary means harm which is not reasonably foreseeable.⁶⁸ After a good deal of hesitation I am inclined to agree with my colleague. My doubt is based on the difficulty which I have in trying to reconcile some passages in the Restatement.⁶⁹ Allowing for this doubt, the Restatement prefers the foreseeability test which English law favored, until *Re Polemis*,⁷⁰ to the test of directness which (as we have stated earlier) was, to some uncertain degree, substituted for it in that case.⁷¹

However, Sections 440 *et seq.* show some resemblance to the doctrine of *nova causa interveniens* of English law which, since *Re Polemis*, is the chief formula for expressing what suffices to snap the chain of causation, for they lay down the rule that "a superseding cause" will prevent the defendant from being liable for harm arising from his antecedent negligence.

It is the court which must determine, upon facts found by special verdict or reasonably inferable from the evidence, whether or not the defendant's conduct caused the harm, but if there is room for reasonable difference of opinion the question must be left to the jury. With us, the court must always settle whether consequences are or are not too remote.

The principle of "superseding cause" is worked out in considerable detail. The effect of negligent conduct in causing fear or emotional disturbance is handled in neater fashion than in our own law, although upon the whole the results are much the same. Acts that are "a normal response to the stimulus of a situation" created by defendant's negligence do not constitute a superseding cause, and this applies to conduct following upon fear or emotional disturbance whether it consists in trying to save oneself or another person from harm (Sections 443-445); but if it is unreasonable it may be contributory negligence (Section 472). Thus the rubrics of causation and contributory negligence cover all that is wanted. In cases concerning the rescue of third parties we seem to be sluggishly reaching what has long been American law,⁷² and in doing so we have dragged in a third element—*volenti non fit injuria*⁷³—which the Restatement rightly ignores. But in exculpation it may be pleaded that a scientific classification of *volenti non fit injuria* seems to be past praying for.

Sections 448-449 deal with the effect of criminal or tortious acts of third persons on the sequence of causation. The principle adopted in Section 448 is sound enough, but Section 449⁷⁴ seems to be no more than a repetition of it with the addition of several puzzling elements. The word "innocent" in the thick type is unintelligible in a section concerned with the crimes or torts of a third person; one sentence in Comment (a) really relates to the existence of the duty to take care and not to the consequences of a breach of it;⁷⁵ and every one of the Illustrations might equally well have been attached to Section 448.

We can now return to the analysis of the factors for determining whether the actor is negligent, apart from any question of the extent of his liability for the consequences of his act.

As has been noticed, Section 282 describes negligence as con-

duct which falls below the standard established by law for the protection of others against unreasonable risk of harm. The standard of conduct is that of a reasonable man and, as with us, *imperitia culpa annumeratur*. It may be fixed by the legislature, the court, or the jury.⁷⁶ The Restatement puts in clearer language than is to be found in English judicial decisions the rules for determining whether a statute excludes altogether actions in tort,⁷⁷ although the effect is much the same as in English law. Incidentally, a new and unconvincing ground is supplied for *Sharp v. Powell*.⁷⁸ The decision was that the defendant was not liable because, although he had infringed a statute by washing his van in a public street, yet the slipping of the plaintiff's horse on a frozen pool formed from the washing water was too remote a consequence. The Institute reaches the same conclusion, but for a different reason—that the purpose of the statute was to expedite travel, not to punish van-washers.⁷⁹ But traveling was exactly what the plaintiff's servant was doing, for he was riding one horse and leading another in the street.

The rules for ascertaining when the actor should recognize the existence of risk of harm are succinctly stated in Sections 289–290 and represent our own law. Sections 291 *et seq.* explore the ramifications of the principles. A risk is unreasonable if its magnitude outweighs what the law regards as the utility of the act done or the particular manner in which it is done. So far as definite rules can be of practical assistance in working out this sum in simple proportion between “utility” and “magnitude of risk,” they are given in Sections 292–293.

On page 797, Topic 4 (Types of Negligent Acts) is introduced by a “Scope Note” which might be clearer. It purports to create a distinction between act and omission. If the actor realizes that his act involves an unreasonable risk of harm to the interests of another, that, and that alone, will make him negligent. It is im-

material whether the act is a breach of contract or of other duty which the actor owes either to the plaintiff or to a third person. But an omission is not negligent unless there is a legal duty on the defendant to act for the plaintiff's protection. I have indicated that "interest" protected by law appears to be the complement of "legal duty to take care." If that be so, the paragraph in the Restatement is reducible to the proposition that no one is negligent in the eye of the law unless there is a precedent legal duty to take care, and that this applies to acts or omissions. What, then, becomes of the distinction drawn above? But no doubt I merely misunderstand what the Scope Note intended to convey.

Conscious misrepresentation causing risk of bodily harm is covered by Sections 310-311. Misrepresentation here seems to signify oral or written misstatement as opposed to implied misrepresentations that unsafe chattels or premises are safe for use; the law concerning them appears in Chapters 13 and 14. Section 310 strikes an English lawyer as being merely one branch of the tort of deceit and, therefore, as more properly placed under "Intentional Harms." He would view the distinction made by the Institute in Comment (a) as unnecessary, because a man is presumed to intend the natural consequences of his own act. If I tell you that ice will bear when I know that it will not, and you fall in and get a chill, that is simply a natural consequence of my deceitful statement,⁸⁰ and there is no need to pray in aid the law of negligence.

Section 311 makes it necessary for one, a part of whose business or profession it is to give information upon which the bodily security of others depends, to use reasonable care in ascertaining the accuracy of that information and in choosing the language in which he gives it. This is a distinct improvement on our own law, where there is no liability for negligent misstatement except (*inter alia*) where it relates to dangerous chattels or premises. In-

deed, the Institute has gone a long way toward acting upon the late Judge Jeremiah Smith's pungent criticisms⁸¹ of *Derry v. Peek*.⁸²

The sections (312-313) on "Emotional Distress" seem to be misplaced. Section 312 ought to go under the earlier volume *Intentional Harms*, and Section 313 would be more appropriately inserted in Chapter 16 on causation.⁸³ So far as their substance goes they are similar to English law except that we have extended the principle of recovering damages for illness caused by nervous shock to include a parent who is terrified at the risk of bodily harm to a child caused by the defendant's negligence;⁸⁴ the Institute declines to commit itself on this point.⁸⁵

The law as to "Duties of Affirmative Action" (pages 852-883) calls for no comment except that its common sense would recommend it to any system, and that the golfing illustration on page 870 is either an imaginary case or a bald and unconvincing narrative of a real one.

Chapter 13 is upon "Liability for Condition and Use of Land." For the purpose of assessing the duty of care of an occupier of premises toward persons entering thereon otherwise than in pursuance of a contract, English law classifies such visitors into (a) invitees, or persons who come in pursuance of some business or material interest which is common to them and to the occupier; (b) licensees (or bare licensees), who have an express or implied permission to enter for their own purposes, but not for the occupier's business or material interest; (c) trespassers.⁸⁶ Upon the whole, the classification adopted in the Restatement is closely parallel to this. Terminology is different, as the "invitee" is styled a "business visitor" (a much more illuminating phrase), and a distinction is set up between a "licensee" and a "gratuitous licensee," but it is a barren one, for study of Sections 330-331 shows that there is no difference between them. More confusing

is the use of "licensee" in Section 341 to include not only the gratuitous licensee but also the business visitor. Another distinction without a difference relates to the person who enters independently of the possessor's assent, not because he is a trespasser but because the possessor cannot keep him out, *e.g.*, a policeman; but Section 345 puts him in just the same position as a licensee. Apart from highway cases, English law, I believe, would first inquire into the exact purpose for which any such person entered the premises and would then classify him as an invitee, a licensee, or a trespasser according as the facts showed him to be one or the other.⁸⁷ It may well be that a policeman is a trespasser if he enters premises unnecessarily.⁸⁸

However, a substantial variation from English law appears in Section 347, which imposes on a public utility (*e.g.*, a railway corporation) a duty toward its patrons higher than that usually owed to an invitee. If it knows or should know of any unreasonable risk, it must make the premises reasonably safe. Mere notification of the danger to the patron will not suffice, although it may be evidence of contributory negligence on his part. One would have liked a better reason for this rule than that which is given—that the possessor can exclude business visitors if he likes, but a public utility cannot do so. A very learned writer is of the opinion that the rule, though with a somewhat wider scope as to persons, ought to be part of our law; but he admits that the trend of judicial dicta is the other way.⁸⁹

The possessor's duties toward trespassers are alike in both systems. Children are dealt with in Section 339, the phrasing of which might have been more exact. The possessor is liable for "bodily harm . . . caused by a structure or other artificial condition. . . ." Is nothing recoverable for injury to the clothing or goods of the child? Does "artificial condition" include a fierce bull or dog? Again, one of the conditions of the possessor's liabil-

ity is that "the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein." The examples given on pages 925-926 seem to give this the rather narrower meaning, "the rendering the condition innocuous is slight as compared to the risk to young children involved therein."

Whether the plaintiff be a business visitor or a licensee, the possessor is under a duty to use ordinary care toward him: that is the substance of Section 341. Beyond that, the duty toward the licensee is the same as that in English law. Our lawyers would say that the possessor must warn the licensee of any concealed danger of "trap" of which the possessor knows. The Restatement quite rightly avoids the word "trap." The duty toward the business visitor is a stricter one. The possessor is liable for dangers of which he knows⁹⁰ or which he could discover by the exercise of reasonable care, unless he either makes the premises reasonably safe or gives adequate warning of the dangers (Section 343). Our law, which is embodied in the rule in *Indermaur v. Dames*,⁹¹ is to the like effect, except that it is still unsettled whether the duty is to make the premises reasonably safe or is merely to ascertain existing dangers and to remove them or to warn the business visitor of their existence.⁹² American law pitches the duty upon the lower note of warning.

It should be remarked that the Restatement makes the possessor liable to the business visitor for the defaults of an independent contractor.⁹³ That is the sole circumstance which has led the writers of English textbooks to isolate the rule in *Indermaur v. Dames* as an independent tort under the heading of "strict liability"—lower than that in the rule in *Rylands v. Fletcher*,⁹⁴ because reasonable care is a defense, and higher than that in negligence, because in the latter vicarious responsibility does not extend to independent contractors. This seems to us more scien-

tific than treating the liability as a species of negligence. On the other hand, the English treatment is rather illogical in bracketing the duties toward the licensee and the trespasser with the duty toward the business visitor, for the two former seem to be only special applications of the tort of negligence, but the convenient title "dangerous premises" or, more accurately, "dangerous structures" has overridden logical considerations.

Purchasers and lessees of premises are in a better position in the Restatement than they are in English law. Our rule is that, apart from express contract, a landlord owes no duty, either to his tenant or to any other person entering the premises, to take care that the premises are safe either at the commencement of the tenancy or during its continuance,⁹⁵ and a vendor of property is under no higher duty.⁹⁶ No better reason for this has ever been advanced than that "fraud apart, there is no law against letting a tumble-down house." That is sound enough where it is patent that the house, or any part of it, is ruinous; but where the danger is not apparent to the lessee or buyer the reason has no application. In addition, the rule puts the poorer classes at the mercy of the jerry-builder and the worst type of landowner. Quite recently it has been criticized in the Court of Appeal,⁹⁷ and some twenty-five years ago was partially altered by legislation.⁹⁸ Sections 351-362 of the Restatement incorporate rules which are more humane.

I have not space for comment on the rest of this chapter, but one point I must add, and that is entire agreement with Professor Goodhart in his strictures on Section 380 (liability of trespassers for bodily harm).⁹⁹ The Illustration on page 1018 is barbaric in its severity.¹⁰⁰ I can barely imagine Anglo-Saxon law reaching such a result; I doubt whether any Year-Book judge would have done so as regards *C's* child; and I am surprised that the Institute should have sanctioned anything so harsh.

Chapter 14 on liability for the supply of dangerous chattels

contains rules most of which are familiar in our own law. The section of greatest interest is that dealing with the ambit of a manufacturer's liability (Section 395). In substance it requires him to exercise reasonable care to make the article safe for any buyer, donee, or lawful user of the article *ad infinitum*. The leading American jurisdictions have long recognized this rule.¹⁰¹ It is consonant with the needs of any modern civilized community, for the user of almost any potentially dangerous chattel must of necessity rely blindly on the manufacturer for its safety. He knows nothing of its composition, and to tell him that he may have a remedy in contract against the retail vendor from whom he bought it is cold comfort, for the vendor is often not worth suing. Our courts have taken much longer to make up their minds on this point than have the American, and it was only in 1930 after nearly a century of conflicting dicta and decisions and only by a bare majority in the House of Lords in *Donoghue v. Stevenson*¹⁰² that the same conclusion was reached. In 1935, the Judicial Committee of the Privy Council followed suit in *Grant v. Australian Knitting Mills, Ltd.*¹⁰³ What had hampered us so much was a tendency on the part of some judges to argue that *because* the manufacturer was under no contractual duty to the ultimate user, *therefore* he could be under no duty in tort.¹⁰⁴ Contract was the perfect circle that must be marred by no indentation or protuberance. It was forgotten that this circle might be intersected by another figure of considerably less regular proportions, the law of tort. One other remark on this branch of the law. The Restatement treats it as a subheading of negligence. English law has favored the idea of making it a species of strict liability, principally because the element of "danger" made a higher degree of care necessary. I venture to think that the American classification is the better one, for I cannot trace anything in the reports from *Dixon v. Bell* (1816)¹⁰⁵ onwards that in-

dicates that the ordinary law of negligence will not adequately yield all that is needed, and this view is confirmed by Lord Macmillan in *Donoghue v. Stevenson*.¹⁰⁶ The care of a reasonable man is a standard sufficient for the manufacture of chattels whether they are dangerous or not. The standard may vary in degree. More care will be required in putting a stick of dynamite in circulation than an umbrella, but that is only another way of saying that a reasonable man does not treat dynamite and umbrellas in the same way.

Contributory negligence occupies Chapter 17, which starts with the assumption that this topic is based on the theory of causation and not on the theory of punishment. The plaintiff will lose his action not because he is penalized for contributory negligence, but if and because it is substantially the cause of his harm.¹⁰⁷ That is the better view and it is now that which is taken in English courts.

The English common law on contributory negligence may be thus summarized. If the plaintiff's contributory negligence was the decisive cause of the harm that he suffered, he cannot recover. The authorities on the test of a decisive cause are confused, but the leading rules seem to be as follows:

1. The defendant is liable if he had the last opportunity of avoiding harm.¹⁰⁸
2. He is probably also liable if he would have had the last opportunity but for his own negligence. This was the decision of the Judicial Committee of the Privy Council in *British Columbia Electric Ry. Co. v. Loach*.¹⁰⁹
3. The plaintiff's negligence is still contributory if there is not a sufficient separation of time, place, or circumstance between his negligence and that of the defendant to make the defendant's negligence the sole cause of the harm.¹¹⁰

The law as thus stated has provoked a storm of criticism. It is

true that, on the face of it, it is not unfair, for I believe that any layman could understand it and would pronounce it to be just. I also believe that, if we had started with the bare rules and if no case on contributory negligence had ever been reported, they would be workable in practice,¹¹¹ for nearly all the trouble arises from strenuous efforts to equate the facts of any given case with those in some earlier decision. But, things being as they are, it is impossible for any lawyer advising a client in any case of contributory negligence, except a fairly simple one, to predict with reasonable certainty the result of litigation, for he will inevitably go to the reports and will often confuse principles with facts peculiar to the cases which embody them. Hence, some such apportionment or reduction of damages as that adopted by the Maritime Conventions Act, 1911, with respect to collisions of ships, would perhaps be preferable; the liability to make good the loss is in proportion to the degree in which each vessel is in fault.

On a broad view, the rules in the Restatement are like those in English law except that *Loach's* case (rule 2 above) is ignored and the defendant is liable only if he actually had the last clear chance of avoiding the harm, and not if he would have had it but for his antecedent negligence.¹¹²

There seems to be one *casus omissus*. Suppose that *A*, driving a train at excessive speed, sees *B* some hundred feet away, with his foot jammed inextricably between the open points of the rails, and suppose that *B* has been negligent in getting into this plight. According to Section 479, *A* is liable to *B* if he can pull up in time and does not do so. Yet the Comment on Section 480 (page 1258) tells us that Section 479 is applicable "only where the plaintiff immediately before his harm could not have discovered his peril in time to avoid it by the exercise of that vigilance which a reasonable man would exercise for his own protection." This sentence

leaves us wondering what *B's* position is. Far from not having been able to discover his peril in time to avoid it, he realized it the moment his foot was trapped, and yet he could not avoid it.

Such is an incomplete review of these two volumes. They certainly ought to carry weight with the profession, considering the number of distinguished lawyers whose advice has been sought in connection with their compilation. That they will find favor with the courts is the earnest hope of every admirer of American law on this side of the Atlantic.

NOTES

¹ I RESTATEMENT, TORTS (1934) Intro. pp. viii-ix.

² *Id.* at ix.

³ *Id.* at xi.

⁴ Adopted and promulgated by the American Law Institute at Washington, D. C., May 11, 1934. Vol. I, Intentional Harms to Persons, Land and Chattels (Intro. pp. vii-xxxii; Text, pp. 1-730). Vol. II, Negligence (Intro. pp. vii-xxxi; Text, pp. 731-1338).

⁵ I RESTATEMENT, TORTS, Intro. xi.

⁶ Prof. Bohlen has informed the author that he is altogether responsible for Volume II.

⁷ It is difficult to fit the definition to Sec. 166 in so far as it deals with extrahazardous activity.

⁸ Fuller details are given in the Comment, Sec. 283.

⁹ Goodhart, *Restatement of the Law of Torts* (1935) 83 U. OF PA. L. REV. 411, 416, where the learned author, in commenting on Sec. 16 (2), Illustration 3, does me the honor of quoting *in extenso* my attempted solution of the problem from an English point of view.

¹⁰ I RESTATEMENT, TORTS, 29.

¹¹ *Aliter* with false imprisonment; Sec. 35 makes proof of harm unnecessary.

¹² I RESTATEMENT, TORTS, § 17.

¹³ Winfield, *The Foundation of Liability in Tort* (1927) 27 COL. L. REV. 1, 7.

¹⁴ I RESTATEMENT, TORTS, § 47. Cf. §§ 306, 312.

¹⁵ Wright, J., in *Wilkinson v. Downton*, [1897] 2 Q. B. 57, 58-59.

¹⁶ "Reasonable" ought to have been inserted before "apprehension" in the Sections rather than in the Comment on Sec. 24.

¹⁷ Some of our textbooks still adhere to the latter word, thus implying (what is certainly not the law) that the plaintiff will lose his action if he is too courageous to "fear" the impending blow, however much he may "apprehend" it.

¹⁸ R. v. St. George, 9 C. & P. 483, 173 Eng. Rep. 921 (1840); *Blake v. Barnard*, 9 C. & P. 626, 173 Eng. Rep. 985 (1840); *R. v. James*, 1 C. & K. 530, 174 Eng. Rep. 924 (1844).

²⁰ Why then are the words "otherwise than by knowledge of the harm or peril of a third person" inserted in Sec. 313 (a)?

²⁰ *Hambrook v. Stokes*, [1925] 1 K. B. 141.

²¹ The Comment on Sec. 35 makes an historical error in describing the action for malicious prosecution as one of trespass on the case. Its origin was case upon the old writ of conspiracy. WINFIELD, *HISTORY OF CONSPIRACY* (1921) 119 ff.

²² Both Sec. 35 (2) and the Comment thereon are not very clear, and in at least one passage they are inconsistent (the words "or some material harm," p. 68, lines 21-22, do not square with the text of the section); and one is left to guess the solution of a variation of the Illustration on p. 69 (If I intentionally lock you in a cold storage vault, in what circumstances am I liable?).

²³ 1 RESTATEMENT, TORTS, §§ 35, 42.

²⁴ 122 L. T. 44 (1920).

²⁵ 1 RESTATEMENT, TORTS, § 57.

²⁶ CLERK AND LINDSELL, TORTS (8th ed. 1929) 174.

²⁷ It does according to *Hegarty v. Shine*, 1 Cox C. C. 145 (1878), an Irish case which as such can have only persuasive authority with an English court; moreover the grounds for the decision were mixed.

²⁸ 1 RESTATEMENT, TORTS, §§ 60-61.

²⁹ WINFIELD, *PROVINCE OF THE LAW OF TORT* (1931) 82-91.

³⁰ C. S. GREAVES, *CRIMINAL LAW CONSOLIDATION AND AMENDMENT ACTS* (2d ed. 1862) 188.

³¹ One gathers from 1 RESTATEMENT, TORTS, 353, 354, that the school board or other authority will itself be liable if it outsteps the privileges conferred upon it by the law.

³² *R. v. Newport (Salop) Justices*, [1929] 2 K. B. 416, 429.

³³ 1 RESTATEMENT, TORTS, §§ 158, 163.

³⁴ *Id.*, § 159.

³⁵ *Id.*, § 194.

³⁶ 10 & 11 GEO. V, c. 80, § 9 (1920).

³⁷ 1 RESTATEMENT, TORTS, § 159, Comment (g).

³⁸ *Ibid.*

³⁹ *Id.*, § 166. The phrase is to be defined in a future volume of the Restatement.

⁴⁰ *Id.*, § 165.

⁴¹ *Id.*, §§ 167-184.

⁴² 13 M. & W. 838, 153 Eng. Rep. 351 (1845).

⁴³ [1915] 1 K. B. 1.

⁴⁴ 1 RESTATEMENT, TORTS, § 191.

⁴⁵ *Id.*, § 214.

⁴⁶ *Six Carpenters' Case*, 8 Co. 1462, 77 Eng. Rep. 695 (1610).

⁴⁷ *E.g., id.*, § 397.

⁴⁸ *E.g., id.*, § 297.

⁴⁹ *Vaughan v. Menlove*, 3 Bing. N. C., 468, 132 Eng. Rep. 490 (1837).

⁵⁰ Winfield, *The History of Negligence in the Law of Torts* (1926) 42 L. Q. REV. 184, 195-196; Winfield, *Duty in Tortious Negligence* (1934) 34 COL. L. REV. 41. One bad feature in the current edition of Beven on Negligence is not so much an obstinate adherence to the author's view (put forward years earlier) that negligence is merely an aspect of the law and not a division of it, as total ignorance of the existence of the wider view.

⁵¹ [1921] 3 K. B. 560.

⁵² *Smith v. London & S. W. Ry. Co.*, L. R. 5 C. P. 98 (1870); same, L. R. 6 C. P. 14 (1870).

⁵³ This formula is near enough accuracy for present purposes, but in fact the terminology used is of great variety and is sometimes confusing.

⁵⁴ *Liesbosch Dredger v. S. S. Edison*, [1933] A. C. 449, 461. We shall have to wait for further judicial exposition of "physical."

⁵⁵ *Greer, L. J.*, in *The Edison*, [1932] P. 52, 68-69; in *The Arpad*, [1934] P. 189, 216; and in *Haynes v. Harwood*, [1935] 1 K. B. 146, 156.

⁵⁶ See especially Lord Atkin in *Donoghue v. Stevenson*, [1932] A. C. 562, 579-580.

⁵⁷ 45 C. J. 624-632, Negligence, §§ 1-2.

⁵⁸ 1 RESTATEMENT, TORTS, § 1.

⁵⁹ Indeed the Restatement occasionally refers to the "duty" of the defendant in preference to the "interest" of the plaintiff; e.g., 2 RESTATEMENT, TORTS, 1158.

⁶⁰ But no assertion of it appears in 45 C. J. 624-632, *supra* note 13.

⁶¹ I have urged elsewhere that the idea of duty is an historical accident in the tort of negligence and might be eliminated from it but for the shock which this would inflict upon ingrained habits of legal thought. Winfield, *Duty in Tortious Negligence* (1934) 34 COL. L. REV. 41-66.

⁶² 2 RESTATEMENT, TORTS, § 454, recognizes the overlapping.

⁶³ Goodhart, *Restatement of the Law of Torts II* (1935) 83 U. OF PA. L. REV. 968, 978-979.

⁶⁴ 2 RESTATEMENT, TORTS, § 283.

⁶⁵ *Id.* at 744.

⁶⁶ "Substantial cause" is a phrase not unknown in English law. *Daves v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (1842); *Swadling v. Cooper*, [1931] A. C. 1.

⁶⁷ "Number of" ought to be deleted. What does it matter whether the other factors number two or two hundred?

⁶⁸ Goodhart, *supra* note 63, at 994-996.

⁶⁹ E.g., in 2 RESTATEMENT, TORTS, § 435, Comment (a), "unexpected" is used twice with contradictory results. *Id.*, § 433, Comment (b), seems to favor foreseeability, yet the sentence at the foot of page 1169 is against it. I cannot help thinking that these pages represent some tinkering.

⁷⁰ [1921] 3 K. B. 560.

⁷¹ The example based on *Re Polemis*, *ibid.*, in 2 RESTATEMENT, TORTS, 1168-1169, is resolved on the foreseeability test.

⁷² Goodhart, *Rescue and Voluntary Assumption of Risk* (1934) 5 CAMB. L. J. 192.

⁷³ *Haynes v. Harwood*, [1935] 1 K. B. 146.

⁷⁴ "If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby."

⁷⁵ 2 RESTATEMENT, TORTS, § 449, Comment (a): "The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger."

⁷⁶ *Id.*, §§ 283, 285, 299.

⁷⁷ *Id.*, §§ 286-288.

⁷⁸ L. R. 7 C. P. 253 (1872).

⁷⁹ 2 RESTATEMENT, TORTS, 759-760.

⁸⁰ *Id.* at 841, Illustration 1.

⁸¹ *ESSAYS IN THE LAW OF TORTS* (1924) 325-340, originally published in (1900) 14 *HARV. L. REV.* 184, and entitled *Liability for Negligent Language*.

⁸² 14 App. Cas. 337 (1889).

⁸³ 2 *RESTATEMENT, TORTS*, §§ 326-328, on "Prevention of Assistance of Third Persons."

⁸⁴ *Hambrook v. Stokes*, [1925] 1 K. B. 141.

⁸⁵ 2 *RESTATEMENT, TORTS*, 851, *caveat*. Why then are the words "otherwise than by knowledge of the harm or peril of a third person" inserted in *id.*, § 313 (a)? They indicate that the parent has no remedy in such circumstances.

⁸⁶ This classification bears the stamp of high authority. *Addie & Sons, Ltd. v. Dumbreck*, [1929] A. C. 358, 371. But *Scrutton, L. J.*, in *Hayward v. Drury Lane Theater, Ltd.*, [1917] 2 K. B. 899, 914, and *Sutcliffe v. Clients & Co., Ltd.*, [1924] 2 K. B. 746, 757, drew a further distinction between an invitee who pays for his entry and one who does not. But that would surely raise a contractual duty?

⁸⁷ The law is not settled upon this point, but my conjecture does not differ materially from *SALMOND, TORTS* (8th ed.) § 133.

⁸⁸ *Great Central R. Co. v. Bates*, [1921] 3 K. B. 578.

⁸⁹ Dr. Stallybrass, the editor of *SALMOND, TORTS*, § 133, *supra* note 87.

⁹⁰ Some of the noble and learned lords in *Fairman v. Perpetual Inv. Bldg. Soc.*, [1923] A. C. 74, 86, 96, 97, added "or ought to know." But, as Dr. Stallybrass points out in his edition of *SALMOND, TORTS*, 518-519, these words were probably used *per incuriam*. The *Restatement* omits them.

⁹¹ L. R. 1 C. P. 274, 278 (1866).

⁹² The authorities are examined in *SALMOND, TORTS*, § 134 (3). The latest dicta recognize the point as still an open one. *Hillen v. I. C. I. Alkali*, [1934] 1 K. B. 455, 465-467, 470.

⁹³ 2 *RESTATEMENT, TORTS*, § 344. *Id.*, Chapter 15, makes "Liability of an Employer of an Independent Contractor" a separate topic.

⁹⁴ L. R. 3 H. L. 330 (1868).

⁹⁵ *Lane v. Cox*, [1897] 1 Q. B. 415.

⁹⁶ *Bottomley v. Bannister*, [1932] 1 K. B. 458.

⁹⁷ *Id.* at 469.

⁹⁸ *Housing &c Act*, 1909, § 14.

⁹⁹ *Goodhart, supra* note 63, at 990.

¹⁰⁰ "A is driving his car along the highway in a neighborhood with which he is unfamiliar. He asks B to direct him to a certain town. B tells him that he can take a short cut through a private road over which the public is not accustomed to travel which B asserts to be on his own land but which, in fact, is on the land of C. While driving carefully along the road, he runs over D, C's three-year-old child, who suddenly dashed out from the bushes which border the road. A is liable to D and C."

¹⁰¹ *E. g.*, *Thomas v. Winchester*, 6 N. Y. 397 (1852).

¹⁰² [1932] A. C. 562.

¹⁰³ [1935] W. N. 175.

¹⁰⁴ *Winfield, Duty in Tortious Negligence* (1934) 34 *COL. L. REV.* 41, 53-54.

¹⁰⁵ *M. & S.* 198, 105 *Eng. Rep.* 1023.

¹⁰⁶ [1932] A. C. 562, 611-612.

¹⁰⁷ 2 RESTATEMENT, TORTS, §§ 462, 465.

¹⁰⁸ *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (1842); *McLean v. Bell*, 147 L. T. 262 (H. L. 1932).

¹⁰⁹ [1916] 1 A. C. 719. It has been adversely criticized, but it seems to be tacitly accepted by the other courts. Cf. SALMOND, TORTS, 480, n. I doubt whether the rule given *id.*, § 126 (7), is anything more than a species of the rule in *Loach's case*, *supra*.

¹¹⁰ *The Volute*, [1922] 1 A. C. 129. A decision on the Maritime Conventions Act, 1911, which was regarded by the House of Lords in *Swadling v. Cooper*, [1931] A. C. 1, 10, and *McLean v. Bell*, 147 L. T. 262 (H. L. 1932) as of general application.

¹¹¹ Professor Goodhart in (1935) 83 U. OF PA. L. REV. 996, considers that it is not clear how the English doctrine would deal with the following problem: "X steps into a street without looking; Y, who is driving at seventy miles an hour, sees him do so when he is 100 feet away but, owing to his speed, cannot stop in time." I think that this difficulty arises from lack of material facts. I should say that if the street is in a large town and the event occurs at midday, Y is liable, on the principle of *Loach's case*. If it occurred at 2 a.m. in a small village, I suggest that Y is not liable because the consequence is too remote. Varieties of fact between these extremes might be resolved on similar principles.

¹¹² See especially 2 RESTATEMENT, TORTS, §§ 479, 480.

ONE HUNDRED YEARS OF TORT LAW

LEON GREEN

THE most understandable portrayal of "one hundred years of tort law" would be a study of the courts' treatment of the more usual problems which have arisen out of the everyday activities of that period. Tort law is nothing more than governmental adjustment and protection incidental to the hurts resulting from such activities—hurts that do not lend themselves in most instances to the less formal processes of government, but which must be entrusted to the more formal administration of courts. How, for example, have the courts dealt with the users of fire-arms, with physicians, surgeons, and hospitals, builders and contractors, manufacturers, and merchants, with respect to the physical hurts to persons and property which they have inflicted; with landowners with respect to the hazards of fire, water, animals, and the uses and development generally of their premises; with power companies, municipalities, railroads, operators of automobiles and other machines that subject the persons and property of the country's population to daily peril; with those who through violence, deceit, defamation, or otherwise hurt the lives, property, and the family, trade, political, and general social relations of citizens generally? It would be only through some such inquiry as would determine the protection the courts have afforded against such perils of our very active society that the growth of tort law during the past century could be indicated. But to pursue such an inquiry would require a study far more extended than can be here undertaken.

Although the law of torts had not become articulate in 1837, there were all the interests for its protection then that we now

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recognize, *viz.*, personality, property, and relational interests. There were all the harms, *viz.*, physical, appropriation, and defamatory harms, to which such interests were subjected. Likewise, there were about the same governmental agencies—judges, juries, lawyers, and the less important ones incident to the judicial process—which afforded somewhat the same type of protection we now have, *viz.*, damages by way of compensation, punishment, and insurance, and prevention by way of injunction. Likewise, there were the stems of legal theory which have developed into such extravagant networks as we have today. But while all of these were present, they were no further along in their development than were industry, trade, and the general social order of the day.

The doctrinal concepts of trespass, nuisance, and deceit were well recognized, but their development was by no means mature. Negligence was emerging. Privacy and abuse of governmental processes were embryonic. Interference with the relations of another without justification was still formless, though several of its subsidiary phases, as libel and slander, and certain actions peculiar to domestic relations had emerged. Anything like an adequate summary of the development of these concepts is beyond the range of brief discussion. All that can be done is briefly to sketch some phase of their development which may be common to all of them.

The most significant such phase, in my opinion, is found in their use for individualizing a case so that it may be determined on its merits with the least possible embarrassment by previous, or to subsequent, decision of other cases. This is the great achievement of the common law in the handling of the multifarious cases we call torts. It is this individualizing facility that gives the judicial process in tort cases the flexibility necessary to deal intelligently with the multitude of everyday hurts worthy of govern-

mental protection. It is through this facility of administrative formulas, through which such concepts are made operative, that the judicial process is enabled to operate for most part after the hurt has occurred, and to utilize the judgment of laymen as to what is just in the particular case in so far as justice can be measured in terms of money. And at the same time it is through this facility that the power to set the bounds of justice as so determined by laymen is reserved to the judge. This individualizing facility affords at once the due process that gives whatever vitality there is to the doctrine of *stare decisis*, and the automatic control that so strictly limits the scope of that doctrine.

TRESPASS

Trespass, the earliest well-defined tort concept to be developed, came into usage during the thirteenth century. The concept was simple, *viz.*, the direct application of violence to the person or property of another. Its formulas were varied to meet the particular types of harm. Trespass *vi et armis* was applicable to hurts to the person and damage done chattels; trespass *de bonis asportatis* to the taking of chattels; trespass *quare clausum fregit* and *de ejectione firmæ* to entries upon and recovery of possession of land. But even as so specialized, they were too simple, and each was expanded and elaborated. Under trespass *vi et armis*,² for example, assault, battery, and false imprisonment became distinct classifications. Even by expanding each of these to the uttermost, trespass *vi et armis* was neither inclusive nor exclusive of all types of physical harms to the person. It did not include hurts indirectly inflicted, nor did it exclude accidents until late, and even then only in the most extreme cases.³

The action on the case, which was not based on a concept more definite than that of harms resulting indirectly, gave the widest latitude for expanding tort remedies,³ and it was through the action on the case in the nature of trespass that liability for hurts

indirectly inflicted was imposed and that the negligence formula was eventually developed.⁴ A century ago the line between trespass *vi et armis* and trespass on the case for negligence was still unsettled, and, with the great increase in personal-injury actions brought about especially by the tremendous growth in traffic and transportation cases, the line became so blurred that the two actions were optional in most cases, and trespass became exclusive only for intended hurts even though the result of direct and immediate violence.⁵ As a consequence and also as a result of the forms of action giving way to more liberalized pleadings, the classification of torts resulting from violence has fallen into the gradually developing categories of *intended* and *unintended* harms.⁶ The latter category is cared for principally by the negligence formula which permits for the first time accidents to be sharply set off without liability.⁷ It has been the work of the last century to develop legal theory for this new classification.

For intended hurts, although trespass as a form of action has fallen into disuse, the legal theory that was developed under it is still available and has lost none of its vitality.⁸ In fact, assault, battery, and false imprisonment have all continued to expand so as to include many new situations, and when they have been found insufficient even broader categories have been developed, such as "unlawful" and "wilful" harms.⁹ These new categories in turn have been supported by "constructive," "implied" or "imputed" intent, and by the "presumption that a person must intend the natural consequences of his act."¹⁰ By such extensions the line between intended and unintended harms has become as blurred as was that between trespass and trespass on the case. The result is that in many cases either the trespass or negligence formula¹¹ is available, and while precision in legal theory is made more difficult, the administration of the particular case has become definitely easier.

If in these relatively simple classifications utilized to determine

liability for the everyday insult, threat, blow, attack, fight, wound, restraint, etc., the courts have found doctrinal precision difficult, they have found it even more difficult in the more refined defensive categories. For example, in giving recognition to the privilege of self-defense the courts found it necessary in gun cases to discard the very civilized doctrine of "retreat" and to substitute for it the "hip-pocket movement."¹² This modification in the gun cases resulted in a general breakdown so that a defendant can claim the privilege in any case if he has reasonable grounds to believe that he is in imminent danger of being attacked.¹³ This presents an issue for jury judgment, and hundreds of cases have been reversed in the appellate courts because of the inappropriateness of the instruction given below on such an issue, and there is still wide disagreement on what the phrasing of the jury formula should be.¹⁴ Another example is found in the doctrine of consent, as simple as it may seem. In the fight cases, consent to mutual combat may be a defense in some jurisdictions, while in others not,¹⁵ though it conceivably might be a defense for minor altercations and not so for serious ones in all jurisdictions. In sex cases consent is a defense to seduction unless the plaintiff is under age¹⁶ or an action is given by statute,¹⁷ but her action may be defeated if she can also be said to be guilty of a crime as, for instance, fornication.¹⁸ On the other hand, even though she be an adult, she may recover if her consent be overcome by what can be called assault.¹⁹ And in the abortion cases consent may or may not be a defense, depending upon the particular attitude of the court.²⁰ Legal theory will support either conclusion. What is true of self-defense and consent is equally true of the supplementary doctrines of defense of another,²¹ defense of property,²² excessive force,²³ provocation, mitigation, and aggravation of damages.²⁴

There is no mystery about what has happened to the law as it is exemplified by the development of the trespass formula. It has

merely been diffused so as to meet the exactions of literally thousands of cases which could not have been anticipated when the formula's original simple lines were traced. It has been expanded indefinitely, and strangely enough, instead of becoming more certain and accurate in its operation, it has become less so as the years have gone by. The doctrinal refinement of the past century, as contrasted with the pleading refinements of the earlier centuries, has resulted in developing an elaborate network of so-called substantive law, which has for its center of gravity the instructions that enable a judge to give a jury a case so that every pertinent factor essential to the most refined grade of justice may be considered by the jury as the basis of its verdict. That the jury may not so respond, or that the judge may not know how to make use of the elaborate theory at his disposal, or that he himself may be afforded the opportunity to exert his own power of judgment more decisively are all by-products. The common-law courts have done their part; they have developed the system. The law is not any longer limited to a few easily identified colors, but consists of a full spectrum of shades by which the conduct of persons may be tested. The trespass formulas have with the fullness of time developed an intricacy that almost defies detailed analysis,²⁸ but they nevertheless permit the discriminating judgment of officials and laymen charged with law administration to filter through to what we like to call the merits of a case and to reach a conclusion in keeping.

NUISANCE

The early nuisance action was relatively narrow in function, and it has had no such far-flung development as has trespass. On the early nuisance stem an action on the case was no doubt grafted so that we have the modern action for nuisance which may be the basis of damages or of a suit for injunction in case

damages do not afford adequate protection. The additional remedies available by private abatement and indictment are probably vestiges of the earlier action.²⁶

Although nuisance is entirely distinct from trespass, it is supplementary to the latter action. Through trespass actions a landowner may vindicate his possession and recover damage for any direct physical invasion of his premises; through nuisance he may protect the enjoyment of his premises against subtler harms from which are absent any appreciable physical force—harms that arise most frequently from some conduct, operation, or development of a neighbor incident to the enjoyment of his own premises. Such harms usually arise through escape of water or filth, pollution of surface streams or subterranean water; pollution of the air with stench, dust, smoke, vapors, and the like; through noises, vibrations, or activities annoying to the sight, social or moral sensibilities, or dangerous to bodily safety. The line between trespass and nuisance is about as clear as any that can be drawn, and though there may be cases in which both formulas are available, they give no great difficulty.²⁷

Otherwise, the nuisance concept is very difficult to bound. Blackstone defined it as "anything done to the hurt or annoyance of the lands, tenements or hereditaments of another."²⁸ This is far too inclusive, as it would comprehend harms resulting from both trespass and negligence. Moreover, the interest protected by an action for nuisance is, primarily, the land occupier's enjoyment of his premises rather than the physical injury to them which may result incidentally, though it too may be included in the action. Equally difficult to state is the formula through which the nuisance concept is made operative. The usual statement is that "one must so use his own property as not to injure that of another."²⁹ Obviously this is but a pious question-begging maxim utterly lacking in any element that would give precision to a court's judgment.³⁰

As a matter of fact, it is impossible to state any broad nuisance formula that is valid. The modern nuisance action is supported by numerous kindred formulas as variable as there are types of nuisances, and each of which is valid only within narrow limits.³¹ With reference to some harms, as noise, smoke, fumes, etc., all that a court can do to poise the question for judgment is to ask whether or not "the prosecution of a business, of itself lawful, in the neighborhood of a dwelling house rendered the enjoyment of it *materially uncomfortable*."³² In a case of blasting a railroad right of way so as to injure a neighboring house by vibrations, "the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy."³³ In quarry-blasting cases it may be a matter of relative expense and profit.³⁴ In other cases it is a matter of "balance of convenience."³⁵ In *Rylands v. Fletcher*³⁶ the formula is strict, but seemingly designed only for protection against the impounding of water³⁷ or the storage of explosives.³⁸ It is too strict for the case of the pond owner against the hillside farmer,³⁹ the henkeeper against the oil refinery,⁴⁰ the telegraph company against the power company,⁴¹ or for protection against the users of steam boilers⁴² or the use of fire generally.⁴³ On the other hand, it is not strict enough for protection against the hazards of oil drilling either as to blowouts⁴⁴ or the impounding of salt water.⁴⁵ In the public-garage and filling-station cases the formulas adopted are extremely flexible;⁴⁶ also in the funeral-home,⁴⁷ hospital,⁴⁸ spite-fence,⁴⁹ and industrial-plant cases.⁵⁰ They reach their strictest form, however, in cases where the conduct of a defendant is in violation of some public statute, especially where health or bodily safety is concerned, and in such cases the conduct is condemned as a nuisance per se. Perhaps in any extreme case the court is inclined to condemn the conduct as a nuisance

per se so as emphatically to indicate that jury participation is not required to determine the issue.⁵¹

With the development of nuisance formulas which has gone on in recent years, and with the even more extensive development of the negligence formula, it was inevitable that the two theories for the determination of liability should come into collision. In nuisance cases it is easy to transfer defendant's conduct to a negligence basis, inasmuch as it can be said that though the defendant is not carrying his operations negligently, nevertheless it is unreasonable that he should carry them on at all.⁵² Even in *Rylands v. Fletcher* cases it is easy to do this, and especially so by making use of a presumption of negligence so as to place the burden of obtaining absolution on the defendant, and where the case is a very dramatic one the *res ipsa loquitur* refinement may be utilized for the same purpose.⁵³

In two types of cases especially are negligence and nuisance used almost synonymously. The first is with respect to landowners and travelers on highways. Where landowners have created conditions or carried on activities that have placed the users of the highway in peril, it is quite natural that such conditions and activities should be treated as nuisances, and liability worked out accordingly.⁵⁴ But if what the landowner does is only a passing incident, then it would doubtless be more accurate to think of his conduct as negligent.⁵⁵ Likewise, it is quite usual to charge a defective or obstructed street as a nuisance,⁵⁶ though it is equally well and perhaps better dealt with as negligence.⁵⁷ A reconciliation of long standing has been worked out by terming such situations as "negligent nuisances," thereby allowing the virtues of both formulas affirmatively and defensively, as the courts may consider desirable.⁵⁸

The second type of case is where a landowner has developed something on his premises with which an uninvited person may

come into contact. The easiest case is an excavation or unguarded danger near the highway. The courts at first preferred nuisance as a theory of liability,⁵⁹ but more recently negligence is equally available.⁶⁰ The intrusions of children upon premises dangerous to them, but which are not nuisances in any sense of the word, are called "attractive nuisances" but they are dealt with as negligence cases.⁶¹ As a matter of fact, in many situations, and especially where the land occupier's activity is closely related to the operations of machines that cause physical hurts, nuisance and negligence as employed by the courts are but two names for a single concept, and the use of one in preference to the other is either merely a matter of professional habit or else an escape from some limitation in the use of the other. Very definitely the negligence formula calls for more extensive jury participation and is more readily adapted to such participation. But the two doctrines are closely kindred, and perhaps due to the fact that there never was an adequate general jury formula developed for nuisance cases, as there has been in negligence cases, the result was inevitable that the very great flexibility of the negligence formula should bring it into use whenever a jury should be desired. The fact that the courts deal with so many negligence cases makes it easy to think in terms of negligence theory, and to transform what might otherwise be a nuisance case into one of negligence. In passing it may be noticed that the English courts have a way of doing the reverse. What would in this country be ordinarily treated as negligence cases are by them treated as nuisance cases, though they are seemingly determined by considerations germane only to negligence.⁶²

By way of contrast with such cases, in the area of strict landowner activities, where the hurts imposed are to the enjoyment of neighboring premises, the nuisance formulas retain their full vitality. And the remarkable thing is that they lend themselves

to nice individualization of the cases by the judges themselves without the aid of juries. This has been especially true since about 1860 in the granting of injunctive relief against nuisances. Before that time courts of equity felt that they must await determination by a court of law regarding the existence of a nuisance before they were free to grant relief by injunction,⁶³ but today in most jurisdictions the courts will act on their own findings.⁶⁴

NEGLIGENCE

The negligence concept is the broadest known to the law. Probably no one has stated it more adequately than Brett, Master of the Rolls, in *Heaven v. Pender*.⁶⁵ His dictum is: "... Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The formula through which such concept is made operative in the particular case may be stated as "whether the conduct in question was that of an ordinarily prudent and careful person acting under similar circumstances." It may be, and frequently is, stated in many other ways, and of necessity is much elaborated when employed in translating a case to a jury.⁶⁶

It will be noticed that the concept is much broader than either trespass or nuisance. In fact, it is so broad that many, if not all, of the harms classified under trespass and nuisance could be brought under negligence. But it will be noticed that it does not go beyond physical hurts. The concept does not comprehend misrepresentation by which another's property is appropriated, or misstatement⁶⁷ or defamation⁶⁸ by which his relational inter-

ests are hurt. There is a great temptation to translate many such cases into terms of negligence theory, but any use of a negligence action involving other than physical hurts to person or property, unintentionally inflicted, is not necessary, and where employed impinges on other areas of legal theory and tends to develop confusion.⁶⁹ Of course, where a case may be stated in terms of one or more kindred doctrines, law administration is greatly advanced, and the negligence, nuisance, and trespass formulas not infrequently permit such alternative statement in cases of physical harms.

It will also be noticed that both concept and formula cover affirmative as well as negative conduct.⁷⁰ In view of the long debate over the nature of negligence,⁷¹ any formulation that unequivocally includes both act and failure to act marks a great advance. Finally, it will be noticed that the formula only makes an inquiry and does not give an answer. It thus marks a great advance in judicial administration over any that is possible under a strict definitional formula.⁷² Inasmuch as negligence as a distinct basis of tort liability is of such recent development, it should not be thought remarkable that its administrative characteristics are superior to those of the older actions or that it should seem to be preferred wherever it can be made adaptable.

While the action for negligence grew out of trespass on the case, it did not gain a firm foothold of its own until the trespass classification was in process of being superseded, as already noted,⁷³ by that of intended and unintended harms. Directness and indirectness, the line between trespass and trespass on the case, cut across intended and unintended harms so that the negligence concept could not gain recognition as long as the line was insisted upon. Any tendency toward relaxation of the severe liability imposed by the trespass formula was smothered for a long time by the contest over the question whether trespass or

case was the proper action,⁷⁴ though excuse for utter innocence had been recognized in trespass cases for several centuries.⁷⁵ Negligence had no significance until cases arose in which the imposition of liability became doubtful policy. Until then trespass on the case was as exacting as trespass.⁷⁶ But doubtful cases came along and some method had to be found to distinguish between innocent hurts or accidents⁷⁷ and those which, while not intended, were still the result of some default on the part of defendant. The conduct of the "ordinary prudent man," which was by no means a new standard in the law, became the core of the formula that was developed for such cases.⁷⁸ Then, as trespass on the case as a form of action gave way to modern pleading, the physical harms for which it had come to be used almost exclusively became known as "negligence" cases.

The situations that furnished the basis for developing both the negligence concept and the general formula were the early traffic cases. In fact, as a part of the development of the negligence basis of liability the supplementary and closely kindred doctrines of contributory negligence,⁷⁹ proximate cause,⁸⁰ assumed risk,⁸¹ gross negligence,⁸² last clear chance,⁸³ *res ipsa loquitur*,⁸⁴ and other doctrines⁸⁵ of the negligence network sprang almost simultaneously from those cases. This network found immediate use in the industrial injuries of the middle 1800's, and out of them were developed other negligence doctrines pertinent to those cases.⁸⁶ Negligence literally grew out of the machine activities of the last century, and it is always most adaptable to the activity of a person with a machine of some sort.

In traffic and transportation cases, negligence has had its most extravagant growth. Beginning with the relatively simple situations of horse and buggy and steamboat, it has served the more difficult ones of railroads, streetcars, and automobiles, and will doubtless afford a similar service for aircraft. The maze of doc-

trine developed is extraordinary, for every situation has required some variation of the general formula and the formulas supplementary to its basic network. Railway crossings, train wrecks, right-of-way trespasses, competition of pedestrian, streetcar, and automobile in street traffic, street crossings, taxi passengers, guest passengers and hitchhikers, the family car, the motorbus, school areas and street play, rescues, insufficient or blinding lights, excessive speeds, bad brakes, intoxicated and incompetent drivers, vehicle and drivers' licenses, defective streets, signal lights, stop signs, parking regulations, drivers' signals, and other incidents of present-day traffic and transportation have each made some variation of the formula necessary. The congeries of doctrines in any single jurisdiction is near bewildering even to one who has no hope for that certainty and uniformity of law so generally desired. But the doctrinal inventions and adaptations of the courts of more than fifty common-law jurisdictions and their legislatures, to say nothing of the ordinances of hundreds of municipalities, are more than any one would ever take the time to comprehend.⁸⁷ Nevertheless, in some fashion or other, thousands of traffic hurts are dealt with annually through the media of these doctrinal devices, and are classified by digest makers as negligence cases.

In affording protection to those who are hurt on the premises of land occupiers, negligence has also undergone extended development. The formula is made adaptable through categories of trespassers, licensees, and invitees. Each of these categories has been so blurred by expansion or exceptions and their lines of demarcation have faded so greatly that the courts not infrequently find it necessary to fall back upon the general formula.⁸⁸ The categories are only available when the hurt is done by the visitor coming into contact with some condition on the occupier's premises. If the hurt is due to activity on his part, some variation of the

general formula must be utilized.⁸⁰ One of the most troublesome of this class of cases is found in the hurts incident to the intrusions of infants. The first impulse of the courts was to treat the landowner as any other user of machines,⁸⁰ but great protest was raised on the part of other courts, with the result that many strange doctrines have been spun in these cases.⁸¹ The protest was based upon the proposition that the intruder was a trespasser, and many courts so held him, thereby making the trespass formula a defensive one to meet a case based upon the landowner's negligence. It is peculiar that the ineptness of the defense was not noticed until many years later, and, strangely enough, by a judge who had nearly twenty years before rigorously insisted upon its validity.⁸² It would seem that the first impulse of the court was correct, and the landowner who uses machinery and carries on dangerous activities, which may be hurtful to those who may be expected to come on his premises, falls under the exactions of the negligence doctrines, and that the fact that he is a landowner does not afford him any immunity.⁸³ This point of view has been greatly clarified in cases where the land occupier is a power company or other similar enterprise, whose occupancy of premises is for the most part but that of a licensee.⁸⁴

Another very remarkable development of negligence doctrines is found in the builder and contractor cases. For a long period the courts seemingly did everything they could to immunize every financially responsible person connected with a construction enterprise from liability. This was done through the independent-contractor doctrine which, with the growing immensity and complexity of construction enterprises, grew complex itself.⁸⁵ Through a series of slowly developing counterdoctrines, such as nuisance if the construction work was on or near a highway,⁸⁶ nondelegable duty,⁸⁷ and especially, more recently, that of a

"dangerous undertaking"⁹⁸—all representative of the same general idea—the tendency to withdraw such immunity except in the simplest cases is very strong. In fact, the doctrines are doubtless in process of reformulation.⁹⁹ Perhaps the desire of a new country for development dictated the policy of freeing the none too well financed enterprises from the incidental hurts to workmen and third persons, while in late years, after the country had been very largely developed, capital had become plentiful, and insurance had become available, it became apparent that the enterprisers, both builder and contractor, could better prevent, as well as bear, such risks than could those who suffered the hurts.

One of the most recent and most significant extensions of negligence doctrines is found in the manufacturer and dealer cases involving hurts caused by their goods to persons with whom the manufacturer or dealer has had no contract relations. Starting from a very narrow exception based on the dangerous nature of a poisonous drug,¹⁰⁰ the orthodox rule of *Winterbottom v. Wright*¹⁰¹ has been supplanted by the broadest sort of negligence formula, which may be used as mildly or as drastically as any known to tort law.¹⁰²

Many other classes of cases which have fallen under the negligence network of doctrines could be mentioned—the defective street cases,¹⁰³ landlord and tenant cases,¹⁰⁴ workmen's cases,¹⁰⁵ fire cases,¹⁰⁶ physician and surgeon cases,¹⁰⁷ the hospital cases¹⁰⁸ (where very definite immunity doctrines were encountered), amusement cases,¹⁰⁹ "fright" cases¹¹⁰—but these are enough to indicate what an enormous development negligence has had during the past century. It has tended to swallow up all competing concepts.

Of the many reasons for this, we think the most compelling one is that the general formula employed in negligence cases is both the simplest in idea, based as it is on the vocabulary of fireside moralities, and the most usable and adaptable in administration of

any found in tort law. On this account it is very satisfactory both to litigant and court. If this is true, one asks, why all of the metaphysical nonsense that has been written and still is being written into the lawbooks about negligence?¹¹¹ There are many valid answers. No one of them can be spelled out here. All that needs to be said is that the procedural formula which has resulted from the administration of negligence cases represents the most highly perfected mechanism of the judicial process. But it is nothing more than a formula. It has no power of its own. It merely provides a methodology by which a judge and jury, with the appurtenances that make up a court, may individualize the largest and most varied group of cases with which government must deal. While this general formula is most apt in negligence cases, it is by no means confined to them. It may be utilized in any tort case, though its terminology may sound strange in some cases and in many of them is not needed.

The formula resolves a case into four inquiries—*viz.*, that of (1) duty, (2) its violation, (3) causal relation, and (4) damages. Each inquiry, however, may require extended consideration before a determination is reached, and in that way involve the usage of much legal theory. And plaintiff must, of course, be sustained on each inquiry in order to be successful.

The "duty" inquiry is one of the later phases of the formula to develop. Professor Winfield has admirably traced its development, but having failed to appreciate its function has indicated serious doubt of its value.¹¹² No extended discussion of its function can be given here. The inquiry about a defendant's duty serves the purpose only of invoking the judge's judgment on whether or not defendant's conduct in the particular case was such as to warrant the further processes of the court in the determination of defendant's liability. Ordinarily, such judgment is so easily made under the facts of most cases that a duty is assumed

and no question about it is raised. In the mine run of suits that are filed, the facts are well within the bounds of thousands of other cases that have been decided by the courts. It is only in the borderline case that the duty inquiry becomes a difficult one. And here a plaintiff does not have to "prove" a duty, as assumed by the English writers.¹³³ It is a matter of law, *i.e.*, a matter for the judge. If the judge rules that there is no duty under the facts pleaded, or pleaded and proved, as the case may be, he simply means that the plaintiff has shown no basis for a court's relief, and the case ends there. Of course, this is not the only ruling he may make that will put an end to the case. There may be a duty, but if the pleading or evidence fails to show any violation of duty or causal relation or damages, his ruling will also be for the defendant. Any one of these failures may result even though he holds there is a duty. And it must be remembered that when a court rules that there is a duty, all that he indicates is that the case may proceed. Put another way, he is willing to say there may be liability if a jury so finds. Plaintiff must still maintain his case, however, on the violation of duty, the causal relation, and damage inquiries called for by the formula. Now and then there is the rare instance where on all points plaintiff's case is so clear that he is entitled to an instructed verdict.

What a judge must consider in ruling on whether there is a duty or not is far too large an assignment for this discussion. I have tried to indicate that to some extent elsewhere,¹³⁴ but there is no statement that could be made which would include all the considerations to be taken into account, for such considerations may include everything that is at the basis of acceptable government as it is administered by judges. Let it suffice to say that the duty inquiry merely requires the judge to exercise this first determination, which must be made in a case before it proceeds for

consideration by a jury. He does not have to give his reasons any more than a jury does in its verdict, though in the appellate courts, when speaking on the same problem, judges do indicate such reasons, sometimes in language common to all men; more frequently, however, they appeal to the relations of the parties, or public policy, or some other such foreclosing terminology; but still more frequently the reasons, if present at all, are submerged in doctrinal language of the law only understood by lawyers, and by no means by all of them.

The term "duty" is most apt in negligence cases, for there it had its origin, but it may be used in trespass, nuisance, deceit, and other tort cases.¹³⁵ In every case it serves the same function, *viz.*, that the judge must first say whether or not the conduct complained of may constitute a trespass or a nuisance or deceit or whatever type of wrong may be charged.¹³⁶ In cases other than negligence, however, our habit is to ask directly in terms of the action involved. We could do the same in negligence,¹³⁷ but it sounds peculiar to ask a judge if the defendant was negligent, because that depends in most situations upon the determination of a jury. It is to miss the point entirely to think of duties as general prohibitions or commands. To talk generally about a duty to use care, or not to apply force directly to the person of another, or to use one's own property so as not to injure the property of another is but to talk in the air.¹³⁸ The duty inquiry, on the other hand, performs a distinctive function in the operation of the general formula which is employed to determine tort liability in a *specific* case. But that being true, it is inescapable that lawyers generally, both on and off the bench, in giving consideration to a problem should speak of a defendant's liability as based on a duty. That is the method by which they project their judgment in specific cases and cases generally. Thus, the "duty" abstraction is no different from the "nuisance," "trespass," or "deceit" ab-

straction as an implement of language, except that "duty" is broad enough to be used as a substitute for any one of the others. For example, one may say in a "deceit" case that defendant was under a duty to disclose the facts; or in a "nuisance" case that defendant was under a duty to keep his water impounded on his premises, and so on. These terms are all concepts that may be employed both generally and very specifically, and I should not take such pains to demonstrate what is so obvious except for the doubt that has been thrown on the term "duty" by such eminent scholars. But general talk about "duties" should not obscure the fact that a particular duty in a lawsuit means only that the judge of the court administering the case has ruled that there is liability if the case be maintained on all other points. The result of such a ruling may be called by other names, it is true, but in dealing with negligence cases the habit of common-law lawyers is to designate it by the term "duty."

The term "violation of duty" serves the function of invoking the jury's judgment on the conduct of the defendant as it appears from the trial. Such inquiry is not reached until the judge has ruled, though not necessarily expressly, that there is a duty, and further that there is sufficient evidence to raise the issue of its violation. In other words, this inquiry is but a method of getting the judgment of the lay branch of the judicial process on the question of liability. Assuming due process otherwise, the jury's verdict is final. Thus, by these two inquiries the judgment of the dual agency is obtained.

It will be noticed that in a negligence case the inquiry whether or not there has been a violation of duty is obtained through the *negligence* formula.¹⁰⁹ The *negligence issue*, i.e., a violation of duty, is the distinctive element of a negligence case. In an action for trespass, the violation of duty is determined by means of the particular formula utilized for jury instructions in the type of

trespass involved. In a deceit case or nuisance case or other case, the issue goes to a jury through some formula pertinent to the particular action. Moreover, each such formula is shaded to the particular type of case being considered. In a negligence case, for example, involving a surgical operation, it is of one shade; in a fire case, railroad-crossing collision, or other case, it will be of a different shade, and so on.

It may be further said that in each case the particular formula, whether of negligence, nuisance, deceit, or otherwise, is usually greatly expanded and explained by numerous supplementary charges, though in England and some of the states the issues may be presented by simple questions.¹²⁰ Also, there may be instructions or questions which present the defensive theories of the defendant as contributory negligence, last chance, and others, and which under the facts may modify or even completely annul the strength of a plaintiff's case.

The "causal relation" inquiry is a simple one, and perhaps was the last to be clearly recognized. It is most unusual indeed for it to be a difficult issue, and, therefore, is normally assumed without mention. Only recently has any adequate formula been found by which to submit the causal relation inquiry to a jury.¹²¹

Finally, in every case the jury must say what the damages are, *i.e.*, they must evaluate in terms of money the hurt which plaintiff has incurred. Conceivably, the evidence may be so clear in some cases that no issue is raised, but in most situations jury judgment is called for and numerous supplementary formulas have developed for aiding a jury in performing this function.¹²² Different types of hurts call for different formulas, but they are all designed to invoke the jury's fair judgment in terms of money, and the possibilities of reconciling doubtful cases of liability through the adjustment of damages are, indeed, indefinite.

There is no case classified as a negligence case which will not

submit to this general analytical and procedural formula. All the theory that has been developed is but supplementary to it, but normally the theory required in the particular case is very limited. As has been well said by Viscount Hailsham in *Swadling v. Cooper*,¹²³ "It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a clear understanding of the issue which the jury has to determine." The formula and its attendant theory may be extended as far or cut as short as is called for by the particular case. Let me repeat that the development of this general formula employed in negligence cases represents the most important advance in tort law of the past hundred years. In the hands of those who understand it, any case can be made to submit to the judgment of the dual agency of jurist and layman with as little embarrassment from past cases and to future cases as could be desired. Its employment calls for intelligence, but its operations reflect the highest aspirations of democratic government. When governmental power has been brought to bear through it, everything has been done that men can do to work out a fair solution of the hurts that others have suffered from the activities of their fellows. Probably the most damning thing that can be said against it is that its processes are too refined and too extensive for a world so heavily populated, so complex, and so active. It may be that for most of our hurts less refined, more easily administered, shorter, and swifter processes might secure better results.¹²⁴ And still further it might be said, and with some truth, that in the great mass of cases the processes called for by this formula are elided to such an extent that it is ruthlessly short and swift. But whatever else can be said, this formula represents the fullest development of jury trial. Through it the functions of judge and layman may be nicely allocated, particular questions may be neatly poised for judgment for both, and what is done by them may be articulated

with as great precision as language permits. In the hands of the able lawyer its administrative possibilities are infinite; in other hands, —.

DECEIT

Deceit was one of the oldest of the common-law writs, and was utilized almost entirely for protection against doubtful practices in court proceedings. When expanded into an action on the case it became available for any type of cheating, abuse of legal process,¹²⁵ false pretenses, etc. As thus expanded it became available in cases involving fraud in sales of goods. Through it the doctrines of warranty were developed, to be later, as incident to assumpsit, transmuted into doctrines of contract.¹²⁶ The development of the deceit concept as the basis of the modern tort action had to await the multifarious development of trade and credit.¹²⁷ The many-pronged deceit formula as we now know it was designed for the trader's protection against the appropriation of his lands, chattels, money, and his credit by the subtleties of misstatement and misrepresentation of all sorts. The doctrines of trespass and conversion protect him against taking by physical force or stealth, but the action for deceit gives him protection against all those types of conduct, known as fraud, by which a trader apparently surrenders his property or credit voluntarily. The formula is, therefore, restricted primarily to sales and credit transactions, supplementing and frequently overlapping the buyers' and sellers' remedies of warranty and rescission, and playing a part all its own with respect to third persons who are not parties to a contract of sale or credit. The action is sometimes used for protecting the personality against physical hurts and appropriation and, not infrequently, in the protection of relational interests. It is out of place applied to physical hurts, as the actions either of trespass or negligence will be found more ap-

propriate. With respect to relational interests it is highly useful. Credit is one of the most important aspects of commercial relations. The deceit formula has been developed, varied, modified, and extended so as to give the general trader protection against practically any sort of unfair dealing. It is one of the most flexible formulas known to the law. I have given rather detailed study to it elsewhere.¹²⁸ I should add, however, that with respect to corporate transactions and securities the extension of the formula has been halting and confused, probably due to the fact that the courts were feeling their way and did not fully appreciate the new interests with which they were dealing.

PRIVACY

The doctrine of privacy introduced a minor formula designed to afford protection against the appropriation of the personality, *i.e.*, a person's body, his capacity for activity or service, his name, likeness, history, or privacy. It is supplementary to the doctrine of conversion, which protects against the appropriation of chattels. There was little need for such a doctrine prior to the development of the modern press, photography, and modern means of communication. The earlier instances of the appropriation of another's personality, such as involuntary servitude, interference with one's freedom of movement, and the like, were dealt with, if at all, by trespass for assault, battery, and false imprisonment, and in case of appropriation by fraud for marital purposes by an action for deceit.¹²⁹ Among the earlier indications of the privacy doctrine are *Gee v. Pritchard*,¹³⁰ *Abernethy v. Hutchinson*,¹³¹ *Albert v. Strange*,¹³² each representing the appropriation of some phase of the plaintiff's personality. But it was not until the article by Warren and Brandeis¹³³ that the doctrine had a name. Since that time it has grown rather steadily, though there are relatively few situations which demand its use.

I have elsewhere sought to analyze it, and have there collected most of the cases and many of the articles that have dealt with it.¹³⁴

INTERFERENCE WITH ANOTHER'S RELATIONS
WITHOUT JUSTIFICATION

The trespass, nuisance, deceit, negligence, and privacy networks of legal theory are designed primarily for the protection of the interests of personality and property. Any pertinency they may seem to have for dealing with hurts to *relational interests*¹³⁵ is incidental. Some relational interests, it is true, are protected against physical hurts, intended and unintended, in which the doctrines of trespass and negligence come into play. For example, the members of a family may be protected under a wrongful death statute against pecuniary loss on account of the intentional or negligent killing of a close relative, or a parent may recover for the loss of services on account of the injury of a child. But in nearly all jurisdictions such actions can be maintained only if there could be recovery for personal injuries. In other words, the protection given the relational interest against physical harms is dependent on the protection available to the personality.

The two harms most prominent in the protection afforded relational interests are appropriation and defamation. They are so closely associated in many cases that their identities can scarcely be separated.¹³⁶ Appropriation is most frequently accomplished, however, through some type of fraud, though it may be done through physical violence, or merely by simple intrusion into another's relations, as inducing a customer to violate his contract. The defamation formulas are peculiar to hurts to relational interests, and until very recently, and excepting family relations, they have afforded nearly all the protection such interests have received. Only lately has a companionate and supplementary concept been developed for the protection of trade relations against

intentional hurts that cannot be justified. But the harm at which this supplementary concept strikes is, nevertheless, appropriation, whether such be achieved through physical violence, fraud, or mere interference with relations based on contract. Instead of calling such hurts "seduction," "alienation of affections" of one's customers or workmen, and the like, as is done in similar harms to family relations, they may be labeled generally "interference with another's relations without justification."

The defamation concept, designed to protect against harmful statements, once under way threatened to take in so much territory that the courts sought to restrict it severely.¹³⁷ Spoken words were confined to definite categories, and although a catchall category of special damages was provided, the proof required to show special damages made the category a narrow one. The formula for written words is general. Both formulas are favorable to the plaintiff in the proof required, in that the plaintiff can make out his case merely by showing the publication by defendant of a defamatory statement. With slight exception, every other element of his case is presumed. The defendant must then show either the truth or justification. Justification is based upon some privilege which carries with it immunity from liability, so long as the privilege is not in some way abused. The immunities granted defendants on account of official privileges, group privileges, and the general freedom of speech and press granted the critic in matters pertaining to the public interest have been very broad, and have been given recognition as defenses in all classes of relational interests. For the most part, these privileges have been developed by the courts during the past century; in them are reflected the policies that limit the operation of the libel and slander formulas. All in all, these formulas have been developed to such a degree that they permit a court to individualize a case to much the same extent as is possible in a negligence case. The doctrinal

network is doubtless more difficult to operate, and it affords the court, as contrasted with the jury, more power to control the outcome of a case.

The companion concept, which has evolved for the protection of trade relations (employment and commercial) against violent, fraudulent, defamatory, or other intentional practices designed to appropriate such relations, is not easily stated. Most attempts to state it are highly question-begging.¹³⁸ About all that can be said is that any unprivileged interference with the trade relations of another is actionable. So stated, its kinship with that of defamation is obvious. The latter is simply more germane with respect to general social, political, and professional relations, while the former is germane with respect to trade relations. Incidentally, it may be noted that the special damage category of the slander formula and actions for slander of title with their strict requirements for the showing of damages are merely forerunners of the later and broader "interference" concept.

The formulas for making this concept operative are likewise difficult of statement. They have not yet been crystallized, as are those of the older actions, and while they all are highly similar they are as variable as the types of cases to which they are pertinent. But, under each of them, all a plaintiff need show is the commission of some practice within the concept, plus damages, and the burden is then thrown upon the defendant to justify his conduct by showing some privilege which affords him immunity. This can rarely be successfully done. It perhaps can never be done in cases of violent, fraudulent, or defamatory practices, unless perhaps the plaintiff could be shown to be the aggressor and the defendant acting only in self-defense. In such case the plaintiff would probably lose by virtue of the weakness of his own case, unless the defensive conduct were so excessive as to be called malicious. But for mere appropriation without any of these prac-

tices, as, for example, the inducement of breach of a contract, the defendant may show a very limited group of defenses, such as that the contract is unlawful and therefore void, or the fact that the business carried on under plaintiff's contract is against good morals, or that the plaintiff is the aggressor and that the defendant is only protecting some contract of his own. If there is no contract at the base of a trade relation, the defendant may rely on what is known as fair competition, which means, essentially, the absence of any of the practices that could be designated as violent, fraudulent, or defamatory.

It may be said in passing that in the early stages of the concept's development the courts attempted to place the burden upon the plaintiff by requiring him to show malice, intent, or some such unlawful purpose, with the result that the plaintiff was afforded protection only in extreme cases, but with more recent development the defendant is required to justify his conduct once the plaintiff has shown such conduct to interfere with his trade relations. While this newer concept has been made operative rather successfully with respect to trade relations involving employment and competition between traders, it is only now being made operative with respect to credits and securities. Here the deceit formula might well have proved entirely adequate had not its development been blocked by the ruling in *Derry v. Peek*.¹³⁹ In England that ruling was promptly modified by legislation, but in this country the courts were compelled to discover various byways to avoid its effect, as I have already indicated. While these supplementary doctrines were adequate for most cases, many courts hesitated to utilize them on the higher levels of commercial transactions, with the result that no adequate formula has yet been developed for dealing with such transactions. The first attempt in that direction was through an adaptation of the negligence formula as in the bean-weighing,¹⁴⁰ insurance,¹⁴¹ and

accountant¹⁴² cases. In the latter case, fortunately Judge Cardozo called a halt to this perversion of the negligence formula.¹⁴³

The basic difficulty in these cases,¹⁴⁴ as in the cases involving the liability of directors for mismanagement of corporate affairs, of corporate trustees under the modern mortgage indenture, and of promoters in the marketing of securities, is a failure to appreciate that the courts are not dealing with the ordinary harms to which the traditional negligence and deceit doctrines are pertinent. Formulas adequate to deal with physical harms to the ownership or possession of tangible property and with transactions involving the purchase and sale of such property have not been adapted to protect the intangible values represented by security interests in the modern corporation. In brief, tort law has not proved adequately sensitive to a fundamental economic development of the century: the separation of control from ownership of tangible property and the concomitant evolution of new relational interests.¹⁴⁵ Subscribers to stocks and bonds in enterprises whose values are not susceptible of measurement by the most sophisticated investor have been afforded only the protection of doctrines evolved to give relief to purchasers of visible tangible goods, purchasers to whom the maxim *caveat emptor* is a practicable rule of conduct.¹⁴⁶ Because of the tremendous complexity of the forces that determine the success or failure of modern business, to require subscribers to corporate securities to prove actual intent, reliance, causal relation, and damages is to give vendors of such securities an arsenal of effective, defensive formulas never enjoyed by the vendor of tangible property at common law.¹⁴⁷ Similarly, in suits for corporate mismanagement the burden of establishing causal relation between inactivity of directors and corporate losses requires the complaining shareholder to demonstrate cause and effect in a sphere of activity which is obviously not susceptible of such dissection.¹⁴⁸ Again, in applying defini-

tions of gross negligence having their source in simple bailee or personal-injury cases to the conduct of corporate trustees, the courts have indiscriminately employed abstract definitions to dispose of the claims of bondholders without regard to the peculiar nature of the relational interest involved.¹⁴⁹

Such interests demand a technique peculiar to the problems that they present—problems foreign to the processes developed for the cases involving physical harms or the harms of appropriation in simple trade cases, both of which require so great a participation by juries. And as is reflected in the opinions of the courts in nearly all cases involving such interests, the judges have played an overwhelmingly dominant part by simply finding no duties, or else working out liability on some strangely inarticulate basis. In many instances the cases are so close to the trust concept that trust formulas might well have been utilized, but for most part they have been rejected except in the very clear cases.¹⁵⁰

Commercial relations of the sort here in question require a maximum of reliability. The exactions of traders on such levels must approach those attendant upon negotiable paper.¹⁵¹ Lumbering jury processes are out of the question. A different type of formula is required, and it can be readily based upon the "interference" concept by requiring the defendant who has caused another loss in his relations of this character to assume the burden of giving some explanation acceptable to the court in order that he may escape liability. For example, in the bean-weighing, insurance, and accountant cases,¹⁵² which involve peculiar knowledge and opportunities for both knowledge and action on the part of the defendants, such a formula would mean inevitable liability, as was in fact so meanderingly worked out by the courts in those cases. In cases of trust mismanagement the results would be similar.¹⁵³ In the directors' cases and marketing cases where good faith and business judgment are so largely involved, there

would be more leeway for the defendant and legitimate defense escapes would be easily found. But such a formula would throw the burden upon defendant of giving a satisfactory explanation, where in all fairness it should rest. Belatedly enough, such a procedure is being developed through the Securities Act, and in the cases under it the courts may well be expected to give life to a formula that will eventually fill the gap that has so long been left open.¹⁵⁴

CONCLUSION

While the concepts and formulas of tort law were for most part well rooted a century ago, their very extravagant development has come since that time. There is nothing strange about this. Law does not develop in a vacuum. Law results from the activities of government incidental to the activities of society at large. The past century has been an extremely active period in invention, exploitation of natural resources, industrial development, and trade, as well as in government, so that tort law has grown very rapidly. In its attempt to keep at the heels of science generally, it has become the most far-flung field of legal practice, and its formulas care for the great bulk of the everyday hurts and conflicts of interests which grow out of the activities of people generally.

The amazing thing, and the one I have attempted to portray here, is the very adequate processes which the courts have developed for individualizing any case that can arise so that it can be dealt with on its merits. The early rigidity of these processes has almost disappeared. They are extremely flexible. They permit the very difficult allocation of power to a dual agency—judge and layman—so that the administration involved in the adjustment of the ordinary case is both as democratic and as reliable as could be expected where the range of variability is so indefinite. Of

course, such processes can be misdirected, misunderstood, and perverted—so can any process of any sort—but in the hands of competent judges and honest jurors, supported by honest and intelligent practitioners, the ideal of justice through law is brought about as near as government can bring it.

In this very hurried account of a single phase of tort law, it will not be understood that its processes are considered adequate, or that there is nothing left to be done by way of their improvement. The sketch I have given is intended to reflect possibilities rather than achievements of successful administration. The processes by which tort law has been developed are dreadfully slow and they have been extremely costly to litigants and society at large. For immediate purposes they have nearly always been inadequate, even though in the long run in some classes of cases they may have finally arrived. As a whole they are not preventive, and prevention is much to be preferred to compensation in terms of doubtful damages or even insurance. The processes of the courts in tort cases should perhaps be regarded as largely experimental, and every so often, when trial and error have reached the point of demonstrating what our objectives should be, it would seem the part of wisdom to transfer certain segments of the tort field to shorter, swifter, less expensive, and more reliable processes. We have gone far in this direction with respect to employee cases, the marketing of securities, and trade competition. Although the Securities Act of 1933, as amended, is well implemented with what appear to be effective civil remedies,⁵⁵ it is becoming increasingly evident that the regulatory controls of the Act, designed as they are to prevent loss by supervising the inception of relations, are its most significant contribution to the solution of the problems involved. We are tardily coming to the point where we must take similar steps with respect to automobile injuries. Wherever safeguards can be devised to prevent hurts and leave

as little as possible to be adjusted after the hurt has occurred, such a policy should be pursued.

The processes that the courts employ in tort cases, and most other cases no doubt, are necessarily hypothetical and provisional. They should be kept that way. If they are relied upon too long without revision there is danger that they will eventually become crystallized. Mere formulas become principles of substantive law; their origins and functions are forgotten. Beggarly and sometimes trivial intellectual makeshifts assume, with age, an authoritativeness to which even the ablest and most highly trained lawyers pay homage as though they were sacred institutions. Legal theory becomes master and drives judges to decisions they desire to escape. A mere technique comes to hold judgment and intelligence in tyrannical bondage. Concepts, formulas, doctrines, rules of the thumb become quickly regimented into legal theory against which free minds must wage relentless warfare. Most lawyers quickly give up the struggle for intellectual freedom to amble from court to court or classroom to classroom as the slaves of doctrinal routine. If they happen to be judges they may even resent the suggestion that this routine is something to be directed rather than followed. Some there are, it is true, who perceive the opportunities it affords to give effect to their own judgments, but who shrink from the thought as something wicked and violative of their official oaths. Others, no doubt, stultify themselves at times by "bootlegging" justice into a case in the hope that the ends may justify their shame. Few are bold enough to treat the stuff we dignify as law as nothing more nor less than the intellectual mechanisms through which lawyers exercise the power society has entrusted to them to serve the ends of government. It is only they who seem to know that, aside from statement, even if there, certainty and uniformity in law are merely the "pot of gold at the end of the governmental rainbow." Any

one who visualizes the development of law during the last century must know that if we continue invention, industry, trade, and scientific methods generally, as we surely shall, the flux of the law will of necessity continue. Thus it is not a stabilization of processes for which we must hope, but their constant revision, as has been in large part carried on during the last century through the work of the courts. Instead of attempting to state the details of every type of problem with precision as to ultimate results in the form of substantive law, it would seem the wiser course to turn the resources of legal scholarship to the invention of further formulas, the pruning of those we already have of their atrophied growths, their simplification or refinement as may seem desirable, and then leave the results, as must be done in all governmental processes, to the intelligence and good faith of those who administer them.

NOTES

¹ No attempt is made to sketch the development of the trespass formulas pertinent to chattels and lands.

² One of the first suggestions that a trespass resulting from accident might be excused is found in *Weaver v. Ward*, 3 Hob. 134 (1607), a case of accidental shooting. The idea was not clarified in such cases until *Stanley v. Powell*, 1 Q. B. 86 (1891), and even now with respect to firearms marks a very slight inroad upon the severe liability imposed by trespass. See *Hawksley v. Peace*, 38 R. I. 544, 96 Atl. 856 (1916). As to accidents causing injury to real property, see *The Nitro-Glycerin Case*, 15 Wall. 524 (U. S. 1872).

³ See Plucknett, *Case and Statute of Westminster II* (1931) 31 COL. L. REV. 778; 3 STREET, *FOUNDATIONS OF LEGAL LIABILITY* (1906) c. 18.

⁴ *Id.* at 250-251, for early examples, the earliest of which is the case of a ferryman who overloaded his boat so that plaintiff's horse was drowned. All of the early cases portend assumption rather than the current development of negligence. See also Winfield, *The History of Negligence in the Law of Torts* (1926) 42 L. Q. REV. 184.

⁵ See Winfield and Goodhart, *Trespass and Negligence* (1933) 49 L. Q. REV. 359, for excellent treatment of the general subject. A good description of this development is also given by STREET, *op. cit. supra* note 3. See particularly *Blin v. Campbell*, 14 Johns. 432 (N. Y. 1817); *Percival v. Hickey*, 18 Johns. 257 (N. Y. 1820); *Clafin v. Wilcox*, 18 Vt. 605 (Vt. 1846); *Jordan v. Wyatt*, 4 Grat. 151, 158 (Va. 1847); *Scott v. Shepherd*, 2 W. Bl. 892, 1 SMITH'S LEADING CASES 329 (1773); *Leame v. Bray*, 3 East 593 (1803); *Rogers*

v. Imbleton, 2 B. & P. N. R. 117 (1806); Moreton v. Harden, 4 B. & C. 223, 10 E. C. L. 316 (1825); Williams v. Holland, 10 Bing. 112, 25 E. C. L. 50 (1833).

⁶ The transition to the classification of intended and unintended harms is not clearly marked, but the classification has become generally accepted. It is made the basis for the RESTATEMENT, TORTS (Vol. 1, p. 26 *et seq.*). See Winfield and Goodhart, *supra* note 5.

⁷ Compare Wakeman v. Robinson, 1 Bing. 213 (1823), Hall v. Fearnley, 3 Q. B. 919 [A. & E. (N.S.)] (1842) with Brown v. Kendall, 6 Cush. 292 (Mass. 1850); Stanley v. Powell, 1 Q. B. 86 (1891).

⁸ Professors Winfield and Goodhart think it still possible to maintain a trespass action for an unintentional accident not happening on a highway. See Winfield and Goodhart, *supra* note 5, at 376-377.

⁹ Reynolds v. Pierson, 29 Ind. App. 273, 64 N. E. 484 (1902); Cordell v. Standard Oil Co., 131 Kan. 221, 289 Pac. 472 (1930); Brown v. Shyne, 242 N. Y. 176, 151 N. E. 197 (1926); Talmage v. Smith, 101 Mich. 370, 39 N. W. 656 (1894); Johnson v. Sampson, 167 Minn. 203, 208 N. W. 814 (1926); Corn v. Sheppard, 179 Minn. 490, 229 N. W. 869 (1930); Bye v. Isaacson, 42 N. D. 417, 173 N. W. 754 (1919); Vosburg v. Putney, 80 Wisc. 523, 50 N. W. 403 (1891); Isham v. Dow's Estate, 70 Vt. 588, 41 Atl. 585 (1898); White v. Levern, 93 Vt. 218, 108 Atl. 564 (1918); Wilkinson v. Downton, [1897] 2 Q. B. D. 57; Janvier v. Sweeney, [1919] 2 K. B. 316. Cf. Ochler v. L. Bamberger & Co., 135 Atl. 71 (N. J. 1926).

¹⁰ *Ibid.*

¹¹ As will appear later, the negligence formula has likewise been expanded by "wilful," "wanton," and "gross" negligence variations.

¹² Laney v. United States, 294 Fed. 412 (1923); Phillips v. Commonwealth, 63 Ky. 328 (1865); State v. Gardner, 96 Minn. 318, 104 N. W. 971 (1906); State v. Meyer, 96 Wash. 257, 164 Pac. 926 (1917); Keep v. Quallman, 68 Wisc. 451, 32 N. W. 233 (1887); see Inbau, *Firearms and Legal Doctrine* (1933) 7 TULANE L. REV. 529; Beale, *Retreat from a Murderous Assault* (1903) 16 HARV. L. REV. 567.

¹³ Brown v. United States, 256 U. S. 335, 41 Sup. Ct. 501 (1921). Cf. Chapman v. Hargrove, 204 S. W. 379 (Tex. Civ. App. 1918); Haverbekken v. Johnson, 228 S. W. 256 (Tex. Civ. App. 1921). See Beale, *supra* note 12.

¹⁴ See Brown v. United States, *supra* note 13; Beck v. Scott, 185 Iowa 401, 170 N. W. 770 (1919); Taylor v. Franklin, 208 Ky. 43, 270 S. W. 462 (1925); Morris v. Miller, 83 Neb. 218, 119 N. W. 458 (1909); McQuiggan v. Ladd, 79 Vt. 90, 64 Atl. 503 (1906).

¹⁵ McCulloch v. Goodrich, 105 Kan. 1, 181 Pac. 556 (1919); Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581 (1886); Colby v. McClelland, 85 Okla. 293, 206 Pac. 207 (1922); Teolis v. Moscatelli, 44 R. I. 494, 119 Atl. 161 (1923); Morris v. Miller, *supra* note 14; RESTATEMENT, TORTS, § 60.

¹⁶ Gaither v. Mescham, 214 Ala. 343, 108 So. 2 (1926); Bishop v. Liston, 112 Neb. 559, 199 N. W. 825 (1924).

¹⁷ Hardin v. Davis, 183 N. C. 46, 110 S. E. 602 (1922).

¹⁸ Braun v. Heidrich, 62 N. D. 85, 241 N. W. 599 (1932) (both minors).

¹⁹ Bye v. Isaacson, 42 N. D. 417, 173 N. W. 754 (1919). Cf. Rouse v. Creech, 203 N. C. 378, 166 S. E. 174 (1932).

²⁰ Szadiewicz v. Cantor, 257 Mass. 518, 154 N. E. 251 (1926); Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N. E. 264 (1924); Andrews v. Coulter, 163 Wash. 429, 1 P. (2d) 320 (1931).

²¹ *Malley v. Lane*, 97 Conn. 133, 115 Atl. 674 (1921); *Frew v. Teagarden*, 111 Kan. 107, 205 Pac. 1023 (1922).

²² *Newcome v. Russell*, 133 Ky. 29, 117 S. W. 305 (1909); *Low v. Elwell*, 121 Mass. 309 (1876); *Curlee v. Scales*, 200 N. C. 612, 158 S. E. 89 (1931); *Kirby v. Foster*, 17 R. I. 437, 22 Atl. 1111 (1891); *Geissler v. Geissler*, 96 Wash. 150, 164 Pac. 746 (1917).

²³ *Ibid.*

²⁴ *Thomas v. Carter*, 148 Miss. 637, 114 So. 736 (1927); *Royer v. Belcher*, 100 W. Va. 694, 131 S. E. 556 (1926); *McCORMICK, DAMAGES* (1935) 275 *et seq.*

²⁵ See *RESTATEMENT, TORTS*, Vol. I, devoted to intentional harms, dealt with almost exclusively by trespass formulas.

²⁶ See generally, 1 *STREET, op. cit. supra* note 3, c. 14, Vol. 3 at 271.

²⁷ See *Winfield, Nuisance as a Tort* (1931) 4 *CAMB. L. J.* 189, 201.

²⁸ 3 *BLACKSTONE COMM.* 216. Also see 3 *COOLEY, TORTS* (4th ed. 1932) § 398: "an actionable nuisance may, therefore, be said to be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights."

²⁹ The maxim is "*sic utere tuo ut alienum non laedas*."

³⁰ See *Bonomi v. Backhours*, El. Bl. & El. 623, 643 (1859). Not infrequently the maxim is made even more question-begging. See *Andrews, C. J.*, in *Booth v. Rome W. & O. T. R. Co.*, 140 N. Y. 267, 35 N. E. 592 (1893): "The real meaning of the rule is that one may not use his own property to the injury of any legal right of another"; and similar statement in *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765 (1896). Also see *Barger v. Barringer*, 151 N. C. 433, 66 S. E. 439 (1909) where it is said to be based upon "the teaching, 'Love thy neighbor as thyself.' Freely translated, it enjoins that every person in the use of his property should avoid injury to his neighbor as much as possible."

³¹ See *Winfield, supra* note 27, for a different view.

³² *Ross v. Butler*, 19 N. J. Eq. 294 (1868). See also *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642, 11 Eng. Rep. 1483 (1865); *Lloyd, Noise as a Nuisance* (1934) 82 *U. OF PA. L. REV.* 567.

³³ *Booth v. Rome, W. & O. T. R. Co.*, 140 N. Y. 267, 35 N. E. 592 (1893).

³⁴ *Beecher v. Dull*, 294 Pa. 17, 143 Atl. 498 (1928).

³⁵ *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S. E. 658 (1904). See (1927) 37 *YALE L. J.* 96; (1922) 36 *HARV. L. REV.* 211. *Swetland v. Curtiss Airports Corp.*, 55 F. (2d) 201 (C. C. A. 6th, 1932). See *McClintock, Discretion to Deny Injunction, etc.* (1928) 12 *MINN. L. REV.* 565.

³⁶ *L. R. 1 Ex. 265* (1866), *L. R. 3 H. L. 330* (1868): "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."

³⁷ *Kall v. Carruthers*, 59 Cal. App. 555, 211 Pac. 43 (1922). In England it has been given a much broader use. *Attorney General v. Cooke*, [1933] 1 Ch. 89. Cf. *St. Anne's Well Brewery Co. v. Roberts*, 140 L. T. 1 (1928). See *Winfield, supra* note 27; *Stallybrass, Dangerous Things and Non-natural Uses of Land* (1929) 3 *CAMB. L. J.* 376, 384.

³⁸ *Exner v. Sherman Power Const. Co.*, 54 Fed. (2d) 510 (C. C. A. 2d, 1931); *Whitemore v. Baxter Laundry Co.*, 181 Mich. 564, 148 N. W. 437 (1914); *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N. E. 528 (1899).

³⁹ *Middlesex Co. v. McCue*, 149 Mass. 103, 21 N. E. 230 (1889).

⁴⁰ *Rose v. Socony-Vacuum Corp.*, 54 R. I. 411, 173 Atl. 627 (1934).

⁴¹ *Postal Tel. & Cable Co. v. Pacific Gas & Electric Co.*, 202 Cal. 382, 260 Pac. 1101 (1927).

⁴² *Marshall v. Welwood*, 38 N. J. L. 339 (1876); *Losee v. Buchanan*, 51 N. Y. 476 (1873).

⁴³ *O'Day v. Shoulin*, 104 Ohio St. 519, 136 N. E. 289 (1922); *Vaughan v. Menlove*, 3 Bing. N. C. 468 (1837). But the negligence formula may be almost as exacting. *Cobb v. Twitchell*, 91 Fla. 539, 108 So. 186 (1926); *Smith v. London & S. W. Ry. Co.*, L. R. 6 C. P. 14 (1870). See Winfield, *supra* note 27, at 203, for excellent discussion of the fire cases.

⁴⁴ *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952 (1928): "Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done."

⁴⁵ *Berry v. Shell Petroleum Co.*, 140 Kan. 94, 33 P. (2d) 953, 141 Kan. 6, 40 P. (2d) 359 (1934) (it will be noted that in this case a city government had intervened and taken control of the salt water which did the damage).

⁴⁶ *Burke v. Hollinger*, 296 Pa. 510, 146 Atl. 115 (1929). See *National Ref. Co. v. Batte*, 135 Miss. 819, 100 So. 388 (1924); *Brown v. Easterday*, 110 Neb. 729, 194 N. W. 798 (1923); *Ruppin, Public Garages as Nuisances Per Se* (1932) 81 U. OF PA. L. REV. 29.

⁴⁷ *Tureman v. Ketterlin*, 304 Mo. 221, 263 S. W. 202 (1924); *Cunningham v. Miller*, 178 Wisc. 220, 189 N. W. 531 (1922).

⁴⁸ *Deaconess Home & Hospital v. Bontjes*, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215 (1904); *Cook v. City of Fall River*, 239 Mass. 90, 131 N. E. 346 (1921); *Brink v. Shepard*, 215 Mich. 390, 184 N. W. 404 (1921).

⁴⁹ *Norton v. Randolph*, 176 Ala. 381, 58 So. 283 (1912); Note (1926) 43 A. L. R. 27.

⁵⁰ *Friedman v. Keil*, 113 N. J. Eq. 37, 166 Atl. 194 (1933); *Krocker v. Westmoreland Planing Mill Co.*, 274 Pa. 143, 117 Atl. 669 (1922); *Quinn v. American Spiral Spring Mfg. Co.*, 293 Pa. 152, 141 Atl. 855 (1928).

⁵¹ *Phelps v. Winch*, 309 Ill. 158, 140 N. E. 847 (1923). See also cases cited *supra* note 38.

⁵² See *Jeremiah Smith, Liability for Substantial Physical Damage to Land by Blasting—The Rules of the Future* (1920) 33 HARV. L. REV. 542, 667; *Harper, Liability without Fault and Proximate Cause* (1932) 30 MICH. L. REV. 1001.

⁵³ See *Kall v. Carruthers*, 59 Cal. App. 555, 211 Pac. 43 (1922).

⁵⁴ *Mitchell v. Brady*, 124 Ky. 411, 99 S. W. 266 (1907); *Congreve v. Smith*, 18 N. Y. 79 (1858); *Rohlf v. Weil*, 271 N. Y. 444, 3 N. E. (2d) 588 (1936); *Tarry v. Ashton*, 1 Q. B. D. 314 (1876); *Barker v. Herbert*, [1911] 2 K. B. 633.

⁵⁵ *Magay v. Claffin-Sumner Coal Co.*, 257 Mass. 244, 153 N. E. 534 (1926); *Hynes v. N. Y. Central R. Co.*, 231 N. Y. 229, 131 N. E. 898 (1921); *Klepper v. Seymour*

House Corp., 246 N. Y. 85, 158 N. E. 29 (1927); *Cole v. City of Durham*, 176 N. C. 289, 97 S. E. 33 (1918); *Kearney v. London B. & S. C. Ry.*, L. R. 5 Q. B. 411 (1870); *Note* (1931) 70 A. L. R. 1365; *Note* (1929) 62 A. L. R. 1067.

⁵⁶ *Cohen v. Mayor, etc., of New York*, 113 N. Y. 532, 21 N. E. 700 (1889).

⁵⁷ *City of Wabasha v. Southworth*, 54 Minn. 79, 55 N. W. 818 (1893); *O'Neill v. City of Port Jervis*, 253 N. Y. 423, 171 N. E. 694 (1930); *Stemmler v. City of Pittsburgh*, 287 Pa. 365, 135 Atl. 100 (1926); *Adlington v. City of Viroqua*, 155 Wisc. 472, 144 N. W. 1130 (1914).

⁵⁸ *Hoffman v. Bristol*, 113 Conn. 386, 155 Atl. 499 (1931); *Hill v. Way*, 117 Conn. 359, 168 Atl. 1 (1933); *McFarlane v. City of Niagara Falls*, 247 N. Y. 340, 160 N. E. 391 (1928). *Cf. City of Hamilton v. Dilley*, 120 Ohio St. 127, 165 N. E. 713 (1929). See *Comment* (1934) 29 ILL. L. REV. 372; *Winfield*, *supra* note 27 at 198.

⁵⁹ *Howland v. Vincent*, 10 Metc. 371 (Mass. 1845); *Hardcastle v. South Yorkshire Ry. & River Drive Co.*, 4 H. & N. 67 (1859). *Cf. Crogan v. Schiele*, 53 Conn. 186 (1885). The English courts still call such situations nuisances, although they let them go to the jury on questions of negligence. See *Barker v. Herbert*, [1911] 2 K. B. 633.

⁶⁰ *Ruocco v. United Advertising Corp.*, 98 Conn. 241, 119 Atl. 48 (1922); *Meiers v. Fred Koch Brewery Co.*, 229 N. Y. 10, 127 N. E. 491 (1920).

⁶¹ *Sioux City & P. R. Co. v. Stout*, 84 U.S. 657 (1873); *United Zinc & Chemical Co. v. Britt*, 258 U. S. 268, 42 Sup. Ct. 299 (1922), *Note* 60 A. L. R. 1444; *Best v. District of Columbia*, 54 Sup. Ct. 487 (1934); *Robert Addie & Sons v. Dumbrock*, [1929] A. C. 358, 45 T. L. R. 267.

⁶² *Barker v. Herbert*, [1911] 2 K. B. 633; *Noble v. Harrison*, [1926] 2 K. B. 332; *Wilkins v. Leighton*, [1932] 2 Ch. 106. See *Deutsch v. Max*, 318 Pa. 450, 178 Atl. 481 (1935).

⁶³ See *Lewis, Injunctions against Nuisances and the Rule Requiring the Plaintiff to Establish his Right at Law* (1908) 56 U. OF PA. L. REV. 288; *Lord Hale's Act*, 25 and 26 Vict. c. 42 (1862); CHAPER, CASES ON EQUITABLE RELIEF AGAINST TORTS (1924) 47; *Phelps v. Winch*, 309 Ill. 158, 140 N. E. 847 (1923); *Campbell v. Seaman*, 63 N. Y. 568 (1876).

⁶⁴ *Id.*

⁶⁵ L. R. 11 Q. B. D. 503 (1883). See also *Lord Atkin's* discussion in *McAlister v. Stevenson*, [1932] A. C. 562, 580. Warning cannot be too frequently uttered against the temptation to press such general concepts into use as definitional tests. Their vitality lies in the resistance they have against crystallization through definition.

⁶⁶ Good examples are found in *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679 (1892); *Shirley Hill Coal Co. v. Moore*, 181 Ind. 513, 103 N. E. 802 (1913); *Davis v. Springfield Hospital*, 196 S. W. 104 (Mo. App. 1917). See *RANDALL, INSTRUCTIONS TO JURIES* (1922) § 4049 *et seq.*

⁶⁷ *Ultramares Corp. v. Touche*, 255 N. Y. 170, 174 N. E. 441 (1931); *Comment* (1931) 26 ILL. L. REV. 49; *LeLievre v. Gould*, [1893] 1 Q. B. 491; *Humphery v. Bowers*, 34 Conn. Cas. 189 (1929); *POLLOCK, THE LAW OF TORTS* (13th ed. 1929) at 296. But see *Maxwell Ice Co. v. Brackett, Shaw & Lunt Co.*, 80 N. H. 236, 116 Atl. 34 (1921); *Glanzer v. Shepard*, 233 N. Y. 236, 135 N. E. 275 (1922); *International Products Co. v. Erie R. Co.*, 244 N. Y. 331, 155 N. E. 662 (1927); *Doyle v. Chatham & Phoenix Nat. Bank*, 253 N. Y. 369, 171 N. E. 574 (1930).

⁶⁸ Sweet v. Post Pub. Co., 215 Mass. 450, 102 N. E. 660 (1913); Jones v. E. Hulton & Co., [1909] 2 K. B. 444; Cassidy v. Daily Mirror Newspapers, [1929] 2 K. B. 331; Balden v. Shorter, [1933] 1 Ch. 427.

⁶⁹ See Smith, *Liability for Negligent Language* (1900) 14 HARV. L. REV. 184; Bohlen, *Misrepresentation as Deceit, Negligence or Warranty* (1929) 42 HARV. L. REV. 733; Carpenter, *Responsibility for Intentional, Negligent and Innocent Misrepresentation* (1930) 24 LL. L. REV. 749. Cf. Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415; GREEN, JUDGE AND JURY (1930) c. 10; Bohlen, *Should Negligent Misrepresentations be Treated as Negligence or Fraud* (1932) 18 VA. L. REV. 703; Green, *Innocent Misrepresentation* (1933) 19 VA. L. REV. 242.

⁷⁰ Brett's dictum is sometimes considered as being limited to affirmative conduct. See Bohlen, *The Basis of Affirmative Obligations in the Law of Tort* (1905) 53 AM. L. REV. 209, reprinted in *STUDIES IN THE LAW OF TORTS* (1926) 33. Conduct is a broad term, and whenever one is in such relation to another as he may be said to be under a duty to act, a failure to do so clearly falls within the meaning of such term. Moreover, it is a rare case in which failure to act cannot be translated into affirmative conduct. If there is what may be said to be an "undertaking," or a "relation upon which an obligation is imposed by law," the assumption of such undertaking or relation is affirmative conduct, and to such assumption is related all subsequent conduct in connection therewith. For examples, the chauffeur who starts his trip but fails to put on his brake when collision is imminent, the nurse who allows the infant to toddle into the path of the automobile, the master who fails to remove the stricken servant from the maze of machinery, the "Good Samaritan" who leaves his charge halfway, the automobile driver who knocks down a pedestrian however innocently, the pregnant mother who in childbirth refuses to call a doctor have acted affirmatively, and are not to be classed with the person who has not "started something," as the bystander who sees a blind man headed for the bluff, a beggar fall from weakness, etc. In other words, what may seem to be purely negative may be given affirmative color by antecedent conduct.

⁷¹ See Winfield, *supra* note 4, at 196 n. 2; Edgerton, *Negligence, Inadvertence and Indifference, etc.* (1926) 39 HARV. L. REV. 849; Seavey, *Negligence—Subjective or Objective?* (1927) 41 HARV. L. REV. 1; Terry, *Negligence* (1915) 29 HARV. L. REV. 40; I STREET, *op. cit. supra* note 3, at 95.

⁷² I am inclined to think that the insistence upon definitional formula lies at the base of the difficulties that most writers have in dealing with negligence. For example, Professor Winfield (*supra* note 4) draws a distinction between negligence as an independent tort and "merely one of the modes in which it is possible to commit most torts." Such distinctions seem to me to be most unhappy and in this connection misleading. The word "negligence" can, of course, be given as many shades of meaning as a fiddlestring can be made to make musical notes, and can be varied to serve as noun, verb, adjective, or adverb. It does not differ in this respect from most general words. But negligence as a tort concept from which a formula or formulas may be developed as a basis for the determination of legal liability should not be confused by the other uses for which the term is employed. To lawyers a negligence action has come to indicate an intricate administrative process for the determination of liability in certain types of cases. That does not mean that the term is not employed in many subordinate ways. For examples, we call such cases "negligence cases"; we speak of one of the steps in the process as the

"negligence issue"; in a general way we talk of many types of conduct as "negligent," much as we use the term "trespass" in the Lord's Prayer.

⁷³ See *supra* note 5, especially Winfield and Goodhart, *loc. cit. supra* note 5.

⁷⁴ See 3 STREET, *op. cit. supra* note 3, at 258 *et seq.*

⁷⁵ See discussion in Stanley v. Powell, [1891] 1 Q. B. 86.

⁷⁶ Castle v. Duryee, 2 Keyes 169 (N. Y. 1865); Rogers v. Imbleton, 2 B. & P. N. R. 117 (1806); Wakeman v. Robinson, 1 Bing. 213, 8 E. C. L. 478 (1823); Hall v. Fearney, 3 Q. B. 919, 43 E. C. L. 1037 (1842).

⁷⁷ The Nitro-Glycerine Case, 82 U. S. 524 (1872); Brown v. Kendall, 6 Cush. 292 (Mass. 1850); Davis v. Saunders, 2 Chit. 639, 18 E. C. L. 437 (1770); Holmes v. Mather, L. R. 10 Exch. 261 (1875); Stanley v. Powell, [1891] 1 Q. B. 86.

⁷⁸ Vaughan v. Menlove, 3 Bing. 468 (N. C. 1837); Lynch v. Nurdin, [1841] 1 Q. B. 29; Brown v. Kendall, *supra* note 77; Blyth v. Birmingham Waterworks Co., 11 Exch. 781 (1856).

⁷⁹ Butterfield v. Forrester, 11 East 60 (1809); Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233.

⁸⁰ Flower v. Adam, 2 Taunt. 314 (1810). The development of this doctrine has interfered greatly with the rational employment of the negligence formula. For discussion and citation of numerous articles, see Prosser, *The Minnesota Court on Proximate Cause* (1936) 21 MINN. L. REV. 19; GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927); JUDGE AND JULY (1930) cc. 6 and 7.

⁸¹ Cruden v. Fentham, 2 Esp. 685 (1798); Bohlen, *Voluntary Assumption of Risk* (1906) 20 HARV. L. REV. 14, 91; Goodhart, *Rescue and Voluntary Assumption of Risk* (1934) 5 CUMB. L. J. 192; Haynes v. Harwood & Son, [1935] 1 K. B. 146.

⁸² One of the most peculiar developments in negligence doctrines is that of gross, wilful, or wanton negligence. The doctrine has several uses. Probably the simplest and most general is simply to denote an extreme case of negligence [see Frederick Green, *High Care and Gross Negligence* (1928) 23 ILL. L. REV. 4; Note 32 A. L. R. 1171, 1190] sufficient to support exemplary damages, and for such purpose the several terms are employed synonymously and take care of the middle ground between intended and unintended harms. The doctrine is frequently used in traffic cases, especially as a means of avoiding the defense of contributory negligence [Note (1936) 10 UNIV. OF CINCINNATI L. REV. 485], and serves the same purpose as the "last chance" doctrine in other jurisdictions. *Walldren Express & Van Co. v. Krug*, 291 Ill. 472, 126 N. E. 97 (1920); *Gibbard v. Cursan*, 225 Mich. 311, 196 N. W. 398 (1923). See *Bremer v. Lake Erie & W. R. Co.*, 318 Ill. 11, 148 N. E. 862 (1935) ("constructive or legal wilfulness"). In Massachusetts a distinction is made between wilful and wanton negligence and gross negligence. *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N. E. 168 (1917); *Altman v. Aronson*, 231 Mass. 588, 121 N. E. 505 (1919). Gross negligence seems there to serve largely as a device by which the courts retain a strict control over guest automobile cases. See Cornish, *The Automobile Guest* (1934) 14 BOSTON U. L. REV. 728. Under the compulsory automobile-insurance law of that state to permit such cases to go to a jury on the simple negligence formula would doubtless mean liability in practically all such cases. By requiring gross negligence to be shown, the court may avoid sending a case to the jury. The doctrine is also employed by the same court to avoid the heavy penalty placed upon the unlicensed automobile under another peculiar doctrine. See Comment (1932)

46 HARV. L. REV. 319 (The Trespasser on the Highway Doctrine); Cook v. Crowell, 273 Mass. 356, 173 N. E. 587 (1930).

⁸³ Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842). See Payne v. Smith, 34 Ky. (4 Davis) 497 (1836). Schofield, *Davies v. Mann: Theory of Contributory Negligence* (1890) 2 HARV. L. REV. 263; Comment (1933) 21 Calif. L. Rev. 257.

⁸⁴ Christie v. Griggs, 2 Camp. 79 (1809); Skinner v. London B. & S. C. Ry. Co., 5 Exch. 787, 155 Eng. Rep. 345 (1850); Scott v. London Dock Co., 3 H. & C. 596 (Ex. 1865). See Prosser, *Res Ipsa Loquitur: Collisions of Carriers with Other Vehicles* (1936) 30 ILL. L. REV. 980; Prosser, *The Procedural Effect of Res Ipsa Loquitur* (1936) 20 MINN. L. REV. 241.

⁸⁵ Hartfield v. Roper, 21 Wend. 615 (N. Y. 1839) (parents' negligence imputed to child); Thorogood v. Bryan, 8 C. B. 115 (1849) (imputed negligence generally); Mills v. Armstrong, *The Bernina*, 13 App. Cas. 1 (1888); Keeton, *Imputed Contributory Negligence* (1935) 13 TEX. L. REV. 161; Comment (1932) 80 U. OF PA. L. REV. 1123; Parker v. Adams, 12 Metc. (53 Mass.) 415 (1847) (violation of statute evidence of negligence); Lynch v. Nurdin, 1 Q. B. 29 (1841) (infant's immunity from contributory negligence).

⁸⁶ See GREEN, JUDGE AND JURY (1930) 106 *et seq.*

⁸⁷ See MacDonald, *The Negligence Action and the Legislature* (1935) 13 CANADIAN BAR REV. 535, and extensive citations; Morris, *The Relation of Criminal Statutes to Tort Liability* (1933) 46 HARV. L. REV. 453; Lowndes, *Civil Liability Created by Criminal Legislation* (1932) 16 MINN. L. REV. 361; Hodges, *The Automobile Guest Statutes* (1934) 12 TEX. L. REV. 303; *Work of the Wisconsin Supreme Court* (1933) 9 WISC. L. REV. 53 (1934) 10 WISC. L. REV. 67 (1935) 11 WISC. L. REV. 57; Lloyd, *The Parking of Automobiles* (1929) 77 U. OF P. L. REV. 336; Wentraub, *Joint Enterprise Doctrine in Automobile Law* (1931) 16 CORNELL L. Q. 320; Mechem, *The Law of Joint Ventures* (1931) 15 MINN. L. REV. 644; Mechem, *The Contributory Negligence of Automobile Passengers* (1930) 78 U. OF PA. L. REV. 736; Cotton v. Wood (1860) 8 C. B. (N.S.) 568; Lattin, *Vicarious Liability and the Family Automobile* (1928) 26 MICH. L. REV. 846; Gregory, *Vicarious Responsibility and Contributory Negligence* (1931) 41 YALE L. J. 831; Reno, *Imputed Contributory Negligence in Automobile Bailments* (1934) 82 U. OF PA. L. REV. 213; Deák, *Liability and Compensation for Automobile Accidents* (1937) 21 MINN. L. REV. 123.

⁸⁸ Meiers v. Fred Koch Brewery, 229 N. Y. 10, 127 N. E. 491 (1920); Hynes v. N. Y. Cent. R. Co., 231 N. Y. 229, 131 N. E. 898 (1921); Hart, *Injuries to Trespassers* (1931) 47 L. Q. REV. 92.

⁸⁹ Brigman v. Fiske-Carter Const. Co., 192 N. C. 791, 136 S. E. 125 (1926); Gallagher v. Humphrey, 6 L. T. 684 (1862); Peaslee, *Duty to Seen Trespassers* (1914) 27 HARV. L. REV. 403.

⁹⁰ Sioux City & P. R. Co. v. Stout, 84 U. S. 657 (1873).

⁹¹ See Buttum's Admr. v. Hawks, 84 Vt. 370, 79 Atl. 858 (1911) for review of theories.

⁹² Humphrey v. Twin States Gas & Electric Co., 100 Vt. 414, 139 Atl. 440 (1927) written by Powers, J., who had previously written the opinion in Buttum's Admr. v. Hawks, *supra* note 91.

⁹³ See Best v. District of Columbia, 54 Sup. Ct. 487 (1934), for all practical purposes overruling the limitations set up in United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 Sup. Ct. 299 (1922). Compare the extremely unenlightened attitude of the English

courts in *Robert Addie & Sons v. Dumbreck*, [1929] A. C. 358, 45 T. L. R. 267, and *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

⁹⁴ See *Stark v. Holtzclaw*, 90 Fla. 207, 105 So. 330 (1925); *Texas-Louisiana Power Co. v. Webster*, 91 S. W. (2d) 302 (Tex. 1936); *Humphrey v. Twin States Gas & Electric Co.*, 100 Vt. 414, 139 Atl. 440 (1927).

⁹⁵ *Ford v. Sturgis*, 14 Fed. (2d) 253, (1926); *Galbraith v. Illinois Steel Co.*, 133 Fed. 485 (C. C. A. 7th, 1904); *Miner v. McNamara*, 81 Conn. 690, 72 Atl. 138 (1909); *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457 (1897); *Berg v. Parsons*, 156 N. Y. 109, 50 N. E. 957 (1898); *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244 (1891).

⁹⁶ *Rohlf v. Weil*, 271 N. Y. 444, 3 N. E. (2d) 588 (1936); *Cole v. City of Durham*, 176 N. C. 289, 97 S. E. 33 (1918); *Tarry v. Ashton*, [1876] 1 Q. B. D. 314.

⁹⁷ *Pickard v. Smith*, 10 C. B. (N. S.) 470 (1861); *Dalton v. Angus*, 6 App. Cas. 740, 829 (1881).

⁹⁸ *Bower v. Peate*, [1876] 1 Q. B. D. 321; *Heaven v. Pender*, [1883] 11 Q. B. D. 503; *Besner v. Central Trust Co.*, 230 N. Y. 357, 130 N. E. 577 (1921); *Warden v. Penn. R. Co.*, 123 Ohio St. 304, 175 N. E. 207 (1931).

⁹⁹ *Colbert v. Holland Furnace Co.*, 333 Ill. 78, 164 N. E. 162 (1928); *McGlone v. William Angus Inc.*, 248 N. Y. 197, 161 N. E. 469 (1928); *DeLee v. T. J. Pardy Const. Co.*, 249 N. Y. 103, 162 N. E. 599 (1928); *Hooey v. Airport Const. Co.*, 253 N. Y. 486, 171 N. E. 752 (1930); *Honeywill v. Larkin Bros.*, [1934] 1 K. B. 191. See *Morris, Torts of Independent Contractor* (1934) 29 Ill. L. Rev. 339; *Chapman, Liability for the Negligence of Independent Contractors* (1934) 50 L. Q. Rev. 71.

¹⁰⁰ *Thomas v. Winchester*, 6 N. Y. 396 (1852); *George v. Skivington*, [1869] L. R. 5 Exch. 1.

¹⁰¹ *Winterbottom v. Wright*, [1842] 10 M. & W. 109.

¹⁰² *Farley v. Edward E. Tower & Co.*, 271 Mass. 230, 171 N. E. 639 (1930); *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916); *Smith v. Peerless Glass Co.*, 259 N. Y. 292, 181 N. E. 576 (1932); *Flies v. Fox Bros. Biscuit Co.*, 196 Wisc. 196, 218 N. W. 855 (1928); *Hertzler v. Manshum*, 228 Mich. 416, 200 N. W. 155 (1924); *McAlister v. Stevenson*, [1932] A. C. 562; *Pollock, The Snail in the Bottle, and Thereafter* (1933) 49 L. Q. Rev. 22; *Grant v. Australian Knitting Mills*, 105 Law Jour. 6 (Privy Council, 1936); *Minutilla v. Providence Ice Cream Co.*, 50 R. I. 43, 144 Atl. 884 (1929). See *Bohlen, Liability of Manufacturers to Persons Other than Their Immediate Vendees* (1929) 45 L. Q. Rev. 343; *Feezer, Tort Liability of Manufacturers* (1935) 19 Minn. L. Rev. 752.

¹⁰³ *Supra* notes 54-60.

¹⁰⁴ *Campbell v. Elsie S. Holding Co.*, 251 N. Y. 446, 167 N. E. 582 (1929); *Kilmer v. White*, 254 N. Y. 64, 171 N. E. 908 (1930); *Deutsch v. Max*, 318 Pa. 450, 178 Atl. 481 (1935). See *Eldredge, Landlord's Tort Liability for Disrepair* (1936) 84 U. of Pa. L. Rev. 467; *Timmons v. Williams Wood Products Corp.*, 164 S. C. 361, 162 S. E. 329 (1932); *Lucy v. Bawden*, [1914] 2 K. B. 318; *Otto v. Bolton*, [1936] 2 K. B. 46.

¹⁰⁵ *Chapman v. Saddler & Co.*, [1929] A. C. 584, 45 T. L. R. 456; *Konskier v. Goodman*, [1928] 1 K. B. 421 (court preferred "continuing trespass" to "negligence," though latter has much more to commend it as a rational theory); *Brooke v. Bool*, [1928] 2 K. B. 578 (volunteers).

¹⁰⁶ *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243 (1896); *Dickelman Mfg. Co. v. Pa. R. Co.*, 34 F. (2d) 70 (N. D. Ohio, 1929); *Harper and*

Harper, *Establishing Railroad Liability for Fires* (1929) 77 U. OF PA. L. REV. 629; Homac Corp. v. Sun Oil Co., 258 N. Y. 462, 180 N. E. 172 (1932); Smith v. London & S. W. Ry. Co., [1870] L. R. 6 C. P. 14.

¹⁰⁷ Luka v. Lowrie, 171 Mich. 122, 136 N. W. 1106 (1912); Loudon v. Scott, 58 Mont. 645, 194 Pac. 488 (1920); Benson v. Dean, 232 N. Y. 52, 133 N. E. 125 (1921); Bannan v. Parsonnet, 83 N. J. L. 20, 83 Atl. 948 (1912); Ault v. Hall, 119 Ohio St. 422, 164 N. E. 518 (1928).

¹⁰⁸ Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N. E. 392 (1920); Greatrex v. Evangelical Deaconess Hospital, 261 Mich. 327, 246 N. W. 137 (1933); Mulliner v. Evangelischer, etc., 144 Minn. 392, 175 N. W. 699 (1920); Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626 (1910); Schloendorff v. Society of N. Y. Hospital, 211 N. Y. 125, 105 N. E. 92 (1914); Feezer, *Tort Liability of Charities* (1928) 77 U. OF PA. L. REV. 191.

¹⁰⁹ Murphy v. Steeplechase Amusement Co., 250 N. Y. 479, 166 N. E. 173 (1929); Cox v. Coulson, [1916] 2 K. B. 177, 32 T. L. R. 406; Comment (1934) 24 CALIF. L. REV. 429 (liability of exhibitors, etc.); (1934) 9 TEMPLE L. Q. 42 (negligence in golf); Hall v. Burklunds Auto Racing Club, [1933] 1 K. B. 205; Brisson v. Minn. Baseball and Athletic Club, 185 Minn. 507, 240 N. W. 903 (1932); Comment (1933) 17 MINN. L. REV. 224.

¹¹⁰ See GREEN, *Fright Cases* (1933) 27 ILL. L. REV. 761, 873; Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 HARV. L. REV. 1033; Goodrich, *Emotional Disturbance as Legal Damage* (1922) 20 MICH. L. REV. 497; Bohlen and Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance* (1932) 32 COL. L. REV. 409, *Liability in Pennsylvania for Physical Effects of Fright* (1932) 80 U. OF PA. L. REV. 627; Hallen, *Damages for Physical Injuries Resulting from Fright or Shock* (1933) 19 VA. L. REV. 253; McCORMICK, *DAMAGES* (1935) 319.

¹¹¹ See 2 RESTATEMENT, TORTS.

¹¹² Winfield, *Duty in Tortious Negligence* (1934) 34 COL. L. REV. 41. See also Buckland, *The Duty to Take Care* (1935) 51 L. Q. REV. 637. Perhaps I do not fully appreciate the target at which Professors Winfield and Buckland direct their fire. I think it must be the conservatism of the English judges which prevents the extension of protection in situations where it seems demanded. The habit of the English lawyer is to think of "duty" as something he can find wholly outside of his own judgment. He seems to look upon the law as a finished product. Thus, the duty inquiry is wholly perverted, and becomes an instrumentality solely for limiting the protection of government rather than one for either limiting or extending it. This habit seems so strong that even when a hard case demands a court's extension of the law, as for example in Chapman v. Saddle, [1929] A. C. 584, 45 T. L. R. 456, such extension is made with the utmost timidity and the court restricts its commitment within the narrowest limits. Doubtless, also, the English courts fear the extension of jury power, and find "no duty" largely because they see no way to safeguard against jury excesses once the power of judgment passes to the jury. The tardy recognition of a manufacturer's liability to a third person would so indicate. McAlister v. Stevenson, [1932] A. C. 562; Grant v. Australia Knitting Mills, 105 L. J. 6 (Privy Council 1936). Even more so is the position taken in Konskier v. Goodman, [1928] 1 K. B. 421, that there may not be a continuing duty in negligence as well as in trespass. Through the "duty" inquiry the judge has

the power to extend as well as limit the growth of the law, and such power approaches that of relatively free judging.

¹²³ Professor Winfield, for example, in his article *Nuisance as a Tort*, *supra* note 27, at 198, says: "In negligence, the plaintiff must prove that the defendant was under a duty to take care; in nuisance this is unnecessary." With all due deference, this distinction does not obtain. The judge must determine under either formula if there was a duty, *i.e.*, he must rule whether plaintiff has pleaded or pleaded and proved any basis for defendant's liability. Compare his analysis in *Columbia Law Review*, *supra* note 112, at 61.

¹²⁴ See GREEN, JUDGE AND JURY (1930) cc. 3 and 4; for specific discussion of formula see pp. 28-37, and 254-261. Also see Tilley, *The English Rule as to Liability for Unintended Consequences* (1935) 33 MICH. L. REV. 829.

¹²⁵ But see Harper, *supra* note 52.

¹²⁶ Incidentally, it may be observed that it is the same inquiry as is made in a contract case when a judge is called upon to say whether the contract covers plaintiff's claim, or in a case involving the construction of a statute. Whether the scope of the contract, statute, or common-law concept (in tort) includes such a case as plaintiff presents demands exercise of the same function on the part of a judge. Such an inquiry is not infrequently made in terms of Remoteness of Damages, Direct Consequences, or Proximate Cause. But these terms are not apt and have obscured both the problem involved and the judge's function.

¹²⁷ We do so in some cases where we have devised specific categories, as, for example, in the landowner cases involving intrusions by the injured party. There we ask, Was the injured person a trespasser, licensee, or invitee? Those categories are for the purpose of enabling the judge better to focus on the duty inquiry. See JUDGE AND JURY, *supra* note 114, at 128, n. 56.

¹²⁸ Buckland, *supra* note 112, makes this point clear, but, seemingly not appreciating the function of the duty inquiry, he concludes that it is a "fifth wheel."

¹²⁹ See JUDGE AND JURY, *supra* note 69, c. 5.

¹³⁰ *Id.*, c. 13.

¹³¹ *Id.*, cc. 6 and 7.

¹³² See generally, McCORMICK, DAMAGES, cc. 9-20.

¹³³ H. L. (1931) A. C. 1.

¹³⁴ See generally, *Financial Protection for the Motor Accident Victim* (1936) 3 LAW AND CONTEMPORARY PROBLEMS 465, *et seq.*

¹³⁵ In recent years false arrests, false levies, and malicious prosecutions are the most usual abuses of governmental processes.

¹³⁶ See I STREET, *op. cit. supra* note 3, c. 27.

¹³⁷ *Parley v. Freeman*, 3 T. R. 51 (1789); STREET, *op. cit. supra* note 3, c. 28.

¹³⁸ See JUDGE AND JURY, *supra* note 69, c. 10.

¹³⁹ *Jelkschewitz v. Groswald*, 265 Mass. 413, 164 N. E. 609 (1929); Anonymous, *Skin*, 119 (1695).

¹⁴⁰ 2 Swans. 403 (1818).

¹⁴¹ 3 L. J. 209 (1825).

¹⁴² 1 Macn. & G. 25 (1849).

¹⁴³ (1890) 4 HARV. L. REV. 193.

¹⁴⁴ *The Right of Privacy* (1932) 27 ILL. L. REV. 237. See recent article by Gerald

Dickler, *The Right of Privacy, A Proposed Redefinition* (1936) 70 U. S. L. REV. 435, for good discussion.

¹³⁵ I have so recently dealt with these interests that I give here only the briefest summary. See *Relational Interests* (1934) 29 ILL. L. REV. 460 (family relations), (1935) 29 ILL. L. REV. 1041 (trade relations), (1935) 30 ILL. L. REV. 1 (commercial relations), (1935) 30 ILL. L. REV. 314 (professional and political relations), (1936) 31 ILL. L. REV. 35 (general social relations). In connection with these articles will be found numerous citations to other articles and to cases far too numerous to be given space here.

¹³⁶ It would seem somewhat strained to talk of appropriating another's relational interests through defamation. We are not accustomed to talk that way. It is not strange, however, to say that a person's standing in the eyes of other people is impaired or even destroyed by defamatory statements. Nor is it a strange idea that in most instances defamatory statements are made designedly to further some interest of the person making the statement. He tears down the standing of another in order to preserve or build up his own. Thus far the "appropriation for his own use and benefit," so frequently heard in conversion cases, is clear enough. There are some cases, however, where a defamer may simply desire to destroy another without gain for himself, or when he has no purpose at all. These are not dissimilar to cases recognized by the conversion doctrines. For example, *D*, to whom *P* shows his diamond stud, throws it overboard into the sea and does it as a good joke, or whatnot. That is as much a conversion or appropriation as if he had run away with it.

¹³⁷ See Veeder, *History and Theory of Law of Defamation* (1903) 3 COL. L. REV. 546 (1904) COL. L. REV. 33; 1 STREET, *op. cit. supra* note 3, c. 19.

¹³⁸ Note the attempt of Brett, L. J., in *Bowen v. Hall*, L. R. 6 Q. B. 333 (1881), and his more particularized attempt in *The Mogul Steamship Co. v. McGregor Gow & Co.*, L. R. 23 Q. B. 598 (1889), where he speaks as Lord Esher, M. R.

¹³⁹ [1889] 14 App. Cas. 337.

¹⁴⁰ *Glanzer v. Shepard*, 233 N. Y. 236, 135 N. E. 275 (1922).

¹⁴¹ *International Products Co. v. Erie R. Co.*, 244 N. Y. 331, 155 N. E. 662 (1927).

¹⁴² *Ultramares Corp. v. Touche*, 255 N. Y. 170, 174 N. E. 441 (1931).

¹⁴³ See Comment (1931) 26 ILL. L. REV. 49.

¹⁴⁴ For the following paragraph in particular, and many suggestions generally, I am indebted to my colleague, Professor Carl B. Spaeth.

¹⁴⁵ BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

¹⁴⁶ Defects in tangible goods either are apparent at the time of purchase or are revealed by use, and when thus discovered the purchaser can, usually without difficulty, demonstrate the resulting loss. Not only are the defects in industrial or financial organization not readily discoverable, but the necessity of correlating loss with failure of the prospectus to disclose material facts presents what is generally an insurmountable obstacle to recovery.

¹⁴⁷ See *National Leather Co. v. Roberts*, 221 Fed. 922 (C. C. A. 6th, 1915); *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107 (1889); *Parnes v. Gnome Mfg. Co.*, 93 N. J. Eq. 470, 117 Atl. 148 (1922); *Belden v. Burke*, 147 N. Y. 542, 42 N. E. 261 (1895). As to the defensive effectiveness of the distinction between forecasts and representations of fact in security transactions, see *Farmers Loan & Mortgage Co. v. Langley*, 166 La. 251, 117 So. 137 (1928); *Kimmel v. Eastern Coal & Mining Co.*, 97 W. Va. 154, 124 S. E. 661 (1924). The defense based on lack of privity is well known: *Peck v.*

Gurney, L. R. 6 H. L. 377 (1873). Technical aspects of rescission based upon the requirement of restoring the *status quo* add to the defensive equipment of the vendor of securities.

¹⁴⁸ For example, in *Barnes v. Andrews*, 298 Fed. 614 (S. D. N. Y. 1924), Judge Learned Hand denied recovery in a suit against an allegedly negligent director on the ground that in a cause of action resting upon a tort "the plaintiff must accept the burden of showing that the performance of the defendant's duties would have avoided loss, and what loss it would have avoided." The required burden involved technical analyses not only of the corporation's financial policy but of its production and sales organization, presumably by means of records not readily accessible to or understandable by the complaining shareholder.

¹⁴⁹ A striking illustration of the unfortunate consequences attendant upon the use of authorities involving hurts to persons or tangible property in the disposition of cases involving complex corporate relations is afforded by Judge Rosenman's opinion in *Hazzard v. Chase National Bank*, 287 N. Y. Supp. 541 (1936). In holding that an exculpatory clause relieved a corporate trustee from liability for negligently permitting substitution of collateral, Judge Rosenman felt himself bound by definitions of gross negligence which require a showing of "a mental attitude of recklessness or wanton disregard." Although the Judge intimated that there might be a tenable distinction between personal-injury cases and the case at hand, he proceeded to employ, without qualification, definitions of gross negligence which have their source in cases involving patently different types of interests. Because of the inability of the courts to work out satisfactory formulas of administration, legislation is deemed necessary to protect investors in corporate bonds. See Securities and Exchange Commission, *Report on the Study and Investigation of Protective and Reorganization Committees*, Pt. VI, Trustees under Indentures (1936). Cf. Posner, *Liability of the Trustee under the Corporate Indenture* (1928) 42 HARV. L. REV. 198.

¹⁵⁰ See BERLE AND MEANS, *op. cit. supra* note 145, c. VII.

¹⁵¹ Polhill v. Walter, 3 B. & A. 115, 110 Eng. Rep. 43 (1832).

¹⁵² *Supra* notes 140, 141, 142. Also see *Doyle v. Chatham & Phoenix Nat. Bank*, 253 N. Y. 369, 171 N. E. 574 (1930).

¹⁵³ For difficulties that have been encountered in such cases, see *Liability of Trustee in the Absence of Causal Relation Between Wrongdoing and Loss* (1936) 50 HARV. L. REV. 317.

¹⁵⁴ See Shulman, *Civil Liability under Security Act* (1935) 44 YALE L. J. 456.

¹⁵⁵ In the following respects, among others, the federal security legislation departs from common-law doctrines: (1) a purchaser may sue even though he did not rely upon the untrue or misleading statement prior to his purchase; (2) a purchaser may sue persons named in the registration statement even though he purchased after the securities had gone through several hands; (3) the burden is placed on the defendant to prove that loss resulted from circumstances other than the untrue statement; (4) the purchaser need not show an intent to defraud, and the defendant is required to establish that he exercised the care of a "prudent man in the management of his own property." The significance of these changes in the law is increased by the fact that the legislation requires a much more complete statement of facts with respect to the business involved than was ever required by common-law rules with respect to omission of facts rendering statements false or misleading. See Shulman, *supra* note 154.

THROUGH TITLE TO CONTRACT AND A BIT BEYOND*

K. N. LLEWELLYN

THE law of Sales, as is well known, is in one phase part of the law of contract, in another phase part of the law of property. It is one thesis of this paper and its companions¹ that in both these phases our prevailing theory has come to overstress heavily the importance of *assent*, in Sales law, whether such theory be regarded as a tool for describing the results of the cases, or as a tool for guiding decision into wise channels, or both. It is a second thesis that the concepts in vogue in Sales law are repeatedly overbroad for intelligent use (so notably the concept Title, or Seller, or Purchase for Value); but that those concepts are at other times too narrow for intelligent use (so the American concept of Action for the Price).² The key both to perception and diagnosis of these ills and to their cure lies, it will be argued, in examination of the fact-situations to which the concepts are applied and of the results of the application. It is a third thesis that again and again, in the history of Sales law, illuminating ideas have been worked out, only to be ignored, or jettisoned, or overwhelmed by less adequate ideology; they are not yet made into standard tools for systematic use, available and availed of whenever and wherever needed. It is time we took thought about such a misfortune and turned to the work of salvage, if Sales law and its relation both to contract law and to effective guidance of decision have any importance to our legal system.³ The three papers together can only scratch the surface of these phenomena, for the latter pervade every aspect of the field which I have explored and

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signal their presence in every aspect which I have even visited on tour. The papers do, however, attempt to demonstrate the existence of the phenomena in sufficient quantity and variety to force a challenge, warrant a protest, and suggest the way for study and reform.⁴

Finally, the three papers represent a personal faith and an attempt to justify it—the faith: that a realist's interest in fact, and in the meaning of people to law and of law to people, in no measure impairs interest on his part for better law.⁵ The present jobs attempt their bit toward justifying the faith by building their suggestions on prior labor over facts and over how the law works out. The realist's credo is and has been that only such labor yields an effective attack on the problem of better law. I hold to that credo.

One caveat is vital. In an effort to get and stay close enough to typical facts to make discussion meaningful, I shall confine this paper to *mercantile* phases of Sales. The situations and results described and the judgments expressed, lie primarily in the realm of the dealer-seller, and again primarily in the realm of dealer-to-dealer or of factorage transactions. They have no application to a farmer's horse trade, and almost none to the purchase by Mrs. Sweeney of a fountain pen or of a new oil burner. They do not touch the questions raised when a boardinghouse keeper turns her furniture over to her landlord for back rent just before the sheriff arrives with an attachment for the coal bill. All these and many other nonmercantile or hardly even semimercantile situations raise problems to which the "general" law of Sales *purports* to have been more or less adequately applied. I suspect that a closer examination of those "Sales" problems in which farmers, consumers, corner retailers other than chain stores, and the like other-than-major-mercantile types dominate the picture would turn up a series of interesting discrepancies, in patterns of out-

come as well as in need, between some or all of such situations and the more purely mercantile ones. For the traditional lump-concept "Seller," in terms of which the Uniform Sales Act is cast, has lost working value not only in the measure in which sellers, and selling units, and business units which have sales units as adjuncts, have come to vary in complexity and power; but has lost value also as growing economic differentiation has channeled the activities and interests of significantly different types of seller (or buyer) into different lines. For example, the utter dominance of contract for sale over present sale is today not only largely limited to the mercantile phases of Sales law, but it is unequally developed in various of those mercantile phases.⁶ In consequence, and in test of the thesis that the concepts basic to the "general law of Sales" are in many aspects not only too general but in their lines of generality poorly adjusted to the facts, I concentrate upon a single portion of the material, itself manifold enough: the mercantile.

* * *

What, then, are the problems with which it is the business of the mercantile law of Sales to cope? They turn chiefly about occasional hitches in the process known to economists as distribution (which includes assembling), to business-school men as marketing (which includes purchasing), to lawyers as formation and performance of contract (which includes sale; which includes also single deals, long-run deals, and legally queer running arrangements of various complexion). A group of men have had a lawyer arrange a number of semimagical rituals of corporation-creating, by virtue of which a whole group can thenceforth be known as "*the seller*"; they have engaged some capital in a business enterprise. They make a series of bargains with other groups, somewhat similarly organized. The bargains include descrip-

tions, general or in finespun precision, of goods to be delivered, often enough leaving much to be filled in later: "Specifications to follow." There are commonly indications of price, time, manner of delivery, manner of packaging, and the like. In most lines the delivery is agreed to be on credit; in some (notably agricultural produce and automobiles sold to dealers)⁸ the seller insists on cash.

Let us take the case of one peculiarly significant type of hitch: "*The buyer*" goes back on "*his*" bargain. The question is whether "the seller" can recover the price, or only damages. The issue is real, narrow, and, under our law, important. But it is also, as we pose it technically, silly. To a silly issue no sane answer is possible. This one we currently pose thus: Has Title passed? and solve by locating a mythical—or should I say more accurately "mystical"—essence known as Title, which is hung over the buyer's head or the seller's like a halo. Halos are, it appears, indivisible. And there is only one halo for buyer and seller to make out with. This does not, as our orthodox doctrine goes, require explanation. It simply is so.

NATURE AND UTILITY OF THE TITLE-CONCEPT

Nobody ever saw a chattel's Title. Its location in Sales cases is not discovered, but created, often *ad hoc*. In real-property matters, to be sure, it is a meaningful concept, because a chain of documents is there for art to construe; it is possible, objectively and definitely, to determine and agree in the great run of cases just where title to a disputed piece of land lies. Not so in Sales disputes, if Title be treated as one fixed whole. The reason for this is clear, though neglected. But before discussing it, let it be remembered that we have in chattel matters availed ourselves of the mass of conceptual inventions already worked out in the law of real property only as one or another of them has been casually

found and almost unlawfully detained.⁹ Is there an unambiguous chain of documents which would afford a firm base line? In the common law of trust receipts such a chain has been seen and seized on,¹⁰ but then, repeatedly, with disregard of what the realty lawyer could offer as a tool to help the buyer out, to wit, the full interest of a mortgagor in possession. Elsewhere, as in the statutes requiring the original bill of sale to be indorsed, etc., when second-hand cars are sold, or in the shipment of goods under straight or order bill of lading, we let the chain-of-title evidence run into curious confusion with unseen, intangible intention.¹¹ We do not, I repeat, in chattel matters, lay hold on a firm objective basis for allocating title when we have one—nor have we consistently utilized or remodeled the available concepts about divided interests. The quarrel thus is, first, with the use of Title for purposes of decision as if the *location* of Title *were* determinable with certainty; and second, with the insistence on reaching for a single lump to solve all or most of the problems between seller and buyer—and even in regard to third parties.

Why is a one-lump Title not determinable with certainty in Sales cases? It is because such a Title is a static concept, a something which is conceived as continuing in somebody. Its type is the book or handkerchief or dog or house, lastingly owned. A pledgor is "owner" not only before and after the pledge, but also after redemption; so is one whose rights are subjected to a common-law lien. You know in such cases where you start from, you know whither to return; you have your base-point firm and fixed. From that base-point courts can work out the rights and powers making up the particular "special property," in terms of what and how much is needed; from that base-point courts can see how much not to give. There is no great occasion for confusion on the point of ownership. This is, I think, one reason why the law of chattel mortgage in some "title" states, or of chattel

mortgagee in possession where title is held to pass on such possession, runs into difficulty: a lump-title is conceived to rest where, from the angle of recurring in due course to the original static situation, it does not belong.

But in Sales cases, no static concept is at home. The essence of the Sales transaction is dynamic. Lump-title fits only in that rare case in which our economy resembles that of three hundred years ago: where the whole transaction can be accomplished at one stroke, shifting possession along with title, no strings being left behind—as in cash purchase of an overcoat worn home. But the commercial contract for sale, the shifting of goods to market via a factor, the shipment against draft, the installment sale, the delivery or shipment on approval, the agreement to sell goods lying in warehouse under nonnegotiable receipt—these are not one-stroke transactions. They involve, each one, a complicated *series* of actions of varying significance. They involve a period, often an extended period, during which matters are in temporary suspension or are in active flux between the parties; over considerable periods of time there is no such Title in *either* party as the static picture of Title suggests. Take the shipbuilding cases. Admit that the builder has much or most of what we know as ownership. Yet is he “free to use,” if buyer’s inspector is on the job, checking on what goes on?⁷² Or if a possible action for specific delivery, or injunction against sale to another, is in the offing? Should the buyer who makes contract payments as building proceeds be regarded as bare of interest simply because the time has not yet come when the transaction will be wholly over and the vessel “his” and his alone? One needs no passing of Title to the vessel, plank by plank, nor does one need a vessel that is buyer’s up to six feet from the keel, and seller’s in what has been built since. One needs only, on the price and security side, a concept akin to equitable charge.⁷³ But I do not want to linger on one illus-

tration. The important point is to see the seller-buyer relation, save where a single stroke severs it utterly, as dynamic movement to which the Whole-Title concept applies on *neither* side. What other meaning have such concepts as specification, assent of seller and assent of buyer to appropriation, lien, stoppage in transit, goods not readily remarketable, delay in delivery, installment, severability? Where the transaction proceeds in a series of lesser actions, often long-drawn-out, no static legal whole-hog concept can fit comfortably, unless some almost violently vital step in the series can be seen to shift the whole scene—as perhaps when a letter of acceptance drops into the mailbox. Such a violently vital step, in Sales transactions, is almost nonexistent. Even open shipment on credit remains subject to stoppage in transit—an idea which the United States Postal Regulations seem not to have been faced with when they entered court.²⁴ *De facto*, then, Sales questions move much along the motto of the most orthodox of modern economists: *Natura non facit saltum*. Which can be rendered: It takes legal fiat to give little facts huge meaning.

This has been felt, and partly responded to, in the Act. Security-title, with action for the price and risk on the buyer, is provided for. Risk does not stay with title when there is undue delay in delivery, under Section 22. Under 43(3) a seller may have passed title, yet have failed to complete his obligation if he does not procure the bailee's attornment to the buyer. (The Conditional Sales Act goes to some trouble to allocate rights, privileges, and powers between the parties while the deal is going on.) Section 49 allows warranty to survive acceptance of title; 47 (1) allows inspection-privilege to survive delivery; and so on.

All of which is excellent, so far as it goes; but no less insufficient than excellent. *It is insufficient not so much because it does not go far enough—and indeed, it does not—as because it fails to lay bare the true problems for visualization and for inquiry.* And

so, for sound solution. The approach of prevailing Sales doctrine, before or apart from the Act and in it, is this: Unless cogent reason be shown to the contrary, the location of Title will govern every point which it can be made to govern. It will govern, between the parties, risk, action for the price, the applicable law in an interstate transaction, the place and time for measuring damages, the power to defeat the other party's interest, or to replevy, or to reject; it will govern, as against outsiders, leviability, rights against tort-feasors, infraction of criminal statutes about sales, incidence of taxation, power to insure. The burden is put upon any individual issue to show why it should be honored by being severed from the Title-lump in any particular, and given individualized treatment. Now this would be an admirable way to go at it if the Title concept (or other basic integrated concept used) had been tailored to fit the normal course of a *going or suspended situation during its flux or suspension*. But Title was not thus conceived, nor has its environment of buyers and sellers had material effect upon it. It remains, in the Sales field, an alien lump, undigested, and interfering with the digestive process.

What is to be striven for, if it can be produced, is some other and different integrated base-line concept which does fit the normality of the seller-buyer relation. I greatly doubt that such a concept can be produced, because today I find too many kinds of seller in contact with too many kinds of buyer in too many kinds of transaction. But what I am clear on is that we *can* isolate *types*, either of transaction, or of party, or of issue, and get light on how better to deal with those *types*. The retailer, the individual consuming-purchaser, the dealer-purchaser, the industrial purchaser have already been suggested and somewhat studied in the literature. The conditional sale,¹⁵ the trust receipt,¹⁶ the letter of credit,¹⁷ the open-term contract,¹⁸ similarly. In a companion paper subdivision of purchase for value is attempted. These are immediate

and worth-while lines of inquiry. One does not go far into any of them without coming on results that sparkle. They may dazzle; but at least they urge on, and many of them will prove jewels of price.

I do not suggest the elimination of the Title-concept. It has its uses. But it should be made to serve merely as the general residuary clause. It should not give forth the norm for decision in each case when no cogent reason is shown to the contrary. Rather should it serve as a better-than-nothing, when inquiry has failed to reveal any other line of solution adapted to the problem in hand. Two further illustrations may make my meaning clear: (1) A statute penalizes "sale of liquor" within a state, and liquor is shipped in, C.O.D. I suppose that the statute could, if drawn with more astuteness, have penalized "delivery" of liquor within the state, or "transfer of possession" of liquor, or "collection of the price" of liquor. One would want to study carefully the lay practices, the decisions, and the personnel of the highest bench, before choosing or cumulating language for the purpose in any state. But no man can doubt the apparent intention of the statute, nor doubt that to a layman the statute seems evaded rather than avoided by the C.O.D. shipment. What reason is there for making the matter turn on Title, when a substantial portion of the action sought to be prevented, and its effective nub, occurs within the state? (2) An ordinance levies a sales tax on goods sold within the city. The amount is small, but the public consciousness of being newly taxed is great. Shall goods shipped out of the city be held subject to the tax? I say the question is an open one of policy.¹⁹ There is no point in making it turn on whether the article is a chair, of which that seen in the store is only a sample, but which is itself shipped from warehouse, or is a rug, and is the particular rug selected. There is no point in making it turn on whether the store does or does not happen to use its own delivery

service in the buyer's community. The question is rather whether or not out-of-town shoppers will be scared off, and the city lose more by that than it gains if it taxes them. Even if one can reach no decision on that, a ruling which turned on the Title lines of the Act—wholly artificial lines, *as to the purpose in hand*—would be a nuisance.

In the balance of the paper an effort will be made to show that in a number of nice issues between seller and buyer, on the mercantile side, Title works out, no less, either to obfuscate statement of the results of rather reasonable decisions, or to misguide decision. The Title-concept is not only not adapted by courts to the real field of Sales dispute; it is also too blunt to fit particular issues as they arise. The cut of its many facets is an old-fashioned one which fits few of the modern situations for which it is called upon as a touchstone. In a word, the Title-concept lumps so many policy decisions together that the same decision about Title, in two cases having similar facts, would repeatedly lead to unfortunate results in one or the other, according to the issue.²⁰ And the courts, whether they talk Title or talk the precise issue, whether they shelter themselves under or disregard the Title-formulae, show in a surprising proportion of the cases a *feel* for the precise issue, for the narrow situation-type, for a fair portion of the relevant policy.²¹ The necessary result of such a situation is that a rule on passage of Title, worked out commonly in a situation where its implication fitted the issue well enough, is either (1) applied blindly to situations in which a different implication is concerned, with regrettable consequence,²² or (2) is sleight-of-handed into inconsistent use in the new situation, to achieve a consequence deemed desirable.²³ Even the process of qualifying and distinguishing, but much more the two processes just noted, in their combination, throw into confusion any lines of *predictable* presuming about Title.²⁴ Yet the courts in such cases are

wrestling with a court's proper job: sound solution, as nearly as may be, of the case in hand, in terms of what will be sound solution of significantly similar cases. They move from facts and issue to result. I do not mean from the mere specific facts of the specific case, nor from the issue merely of "Is this judgment to stand?" I mean that they move from *types* of fact, and *types* of issue, felt, even when not expressly classified, in categories as narrow as seems necessary to get roughly adequate results in the cases. I hold that they ought to move thus. I hold that the Title-concept hinders them as often as it helps. Why, then, bother to insert the mythical Title into the reasoning? I find "no better reason than that it was so laid down in the time of" George III.

1. *Price or Damages*

When one returns to the buyer who goes back on his contract, and to the question whether the seller can have the price or must rest content with damages, one finds Title, as it operates in the decisions, a useless additional link in reasoning, and one often clumsy. The issue of the seller's remedy presents an instance. We pose it: price or damages? Posing it thus is, as has been said, essentially silly, because it distracts us from the true issue.

For consider: We live, for better or worse, in a bargain economy. If bargains, or any particular bargains, are to be enforced by courts at all,²⁵ Benefit of the Bargain is the sane standard for a court to enforce by. But then decently admeasured damages are all a seller needs, and are just what a seller needs, when the mercantile buyer repudiates. It is, indeed, social wisdom for the rest of us to leave the selling house, in most cases which have not involved shipment to a distant point, to dispose of whatever goods may have come into existence or into its warehouse; that is its

business, and the buyer's prospective inability has been already evidenced. To force such goods on the buyer, where they are reasonably marketable by the seller, is social waste; moreover, even a welshing buyer can properly ask that goods neither manufactured nor contracted for by the seller be not made up or acquired to his damage. On the other hand, shipment to a merchant at a distant point makes seller's resale burdensome in too many cases for comfort, and affords almost indecent leverage to a defaulting buyer, if he bargains for reduction of the price in return for his acceptance, whereas the merchant in the market of arrival is on the ground and can normally exercise better judgment in reselling than can the distant seller. This seems to present a case that tips the balance of social utility in favor of forcing title on the buyer. Curiously, a line of cases has tended precisely here, under the semiprotection of Act, Section 19(5), to allow the buyer to repudiate title,²⁶ though in a contract for delivery f.o.b. seller's city he could not. Whatever one's views on who can best resell in the distant market, it is clear that, once the goods have arrived in the buyer's city, the social balance tips against the buyer.

When, however, the selling outfit is remitted to damages, surely it needs reasonable time to dispose of goods, and needs some time doubly if the market continues to drop while it tries to; and it needs account taken of expenses incurred (as in reshipping or commissions), or else it needs account taken of the normal selling overhead in its line, if it uses its own organization to resell. None of these factual needs turns at all on whether or not Title has Passed, which is the basic legal criterion under Act, Section 63. But with our eyes firmly fixed on the nineteenth-century precedents about Goods Bargained and Sold,²⁷ and with Price making the seller whole (at buyer's cost, and sometimes at cost to the rest of us) wherever the seller happens by the accidents of Title-

theory to be able to get the price, we get our minds distracted from the real point, which is the working out of a sane law of Benefit of Bargain for such cases.²⁸

Has this distraction come about because no man has yet conceived a sounder solution? It has not. New York had before the Sales Act worked out a somewhat persuasive answer by way of extending the action for the price, politely junking all regard for the technical requirements of the common counts by inventing an action for the price in special assumpsit. The solution was persuasive enough to have found favor with most American courts. It was, thereupon, deliberately rejected in the Act. It was rejected at least in good part because England had not happened to work it out, and because its introduction in New York had rested on exceedingly dubious legal reasoning.²⁹ But what real innovation ever rested on anything but dubious legal reasoning? By the definition of innovation, real innovation on sound legal reasoning is impossible. The question must always be: Is the thing accomplished *worth-while enough to warrant revising* prior legal theory? In this instance, it was. Not that the New York solution was perfect. It was not. But it was reasonably good. It *allowed* a seller coverage against fall in the market while he was reselling, by letting him recover price less proceeds (though the selling overhead was lost from sight). It did not, however, *force* his resale, and thus allowed him to throw the goods onto the buyer's hands—which, as the Act recognizes,³⁰ is sound enough policy as to a set of false teeth or a batch of castings manufactured on unique specification, but is far from a satisfactory outcome in the run of mercantile cases. What made the older New York rule relatively satisfactory in practice was that a seller could, and would, put himself in funds more rapidly by resale than by a lawsuit; but that resale was not forced on him by considerations of safety while negotiations looking toward adjustment were still

running their business course.³¹ On paper, the allotment of remedies in the Act can be made persuasive enough (save for the relations of Sections 60 and 61).³² In practice it is both harsh to the particular case and uneconomic to the community. And, in a falling market, the type case in which the buyer backs out, *the rules of the Act press the seller away from adjustment and into a lawsuit.*³³

For be it noted that in pruning the older New York rule out of the law, our Act did more than merely choose between two base lines, each of which was adequate after a fashion. The English model, in limiting the price action (normally) to the case where "title has passed" (and thus frequently forcing the seller to do its own redistribution, which is commonly good) is accompanied in English court administration by a leeway in damage admeasurement which leaves such admeasurement substantially true to its function; a leeway not nominal, but real; a discretion not merely available, but used. True, the language of the sections on buyer's damages for nondelivery and seller's for nonacceptance does not differ materially in either the English Sale of Goods Act or the American Sales Act, nor as between those Acts. What does differ is *practice of the courts.*³⁴ I suspect that such divergence in judicial practice was, if not foreseeable, at least so probable as to call for special wording in the American Act to make the borrowed English price rule work here as well as it did at home. But, that apart, the present American judicial practice under the damage rules cries out for reform either of itself or of the statutory language. There is not only the strict "time and place where title was to have passed" line of damage-measurement, with its queer assumption that a market operates in frictionless instantaneity;³⁵ there is, beyond that, the insistence in a number of our states that when, on doubtful fact or law, no man can tell whether or not "title" will be held to have passed, a seller

who is *ex hypothesi* in the right can yet be forced to elect his theory at his peril—a procedural barbarity.³⁶ The English model does not operate thus. I have not yet seen a modern English case in which a seller, in a case thus doubtful on location of title, was forced to his election at risk of upset;³⁷ or in which, without inquiry regarding business decency in the circumstances, a flat rule of precise time and place of agreed delivery was insisted on.

The problem is, I repeat: Why has our Sales law failed to *develop*, or even to *use*, serviceable discriminations and devices *after* they have been invented?

I concur with Fuller that conceptual or “doctrinal bridges”³⁸ mightily further legal engineering. But here, on both the price side and the damages side, such bridges have come into existence—only to be later either ignored or dynamited.³⁹

2. Risk of Damage or Loss

Let us turn to another typical hitch in the normal marketing process, in which again Title-reasoning deflects attention from the issue, and, again, despite clear indications of a wiser approach in cases more than half a century old. *Certain goods are damaged or destroyed*. The question is: Shall buyer or seller take the loss? Once more, the question bears procedurally on price: Must the buyer pay it; or if it has been paid, can he get it back? Again we make it turn normally on the location of the Title-halo. At times the reasoning of the cases, put together, verges on the ludicrous; if the parties have agreed where risk is to be, we use that to tell where Title is,⁴⁰ whereas we manage to learn from Title where to put the risk.⁴¹

But in any other contract than one envisaging a sale of goods we should, in solving a risk-problem, go to work very differently. We should ask first, of course, as we do now, whether or not any goods were clearly enough specified to the contract even to raise

a question of risk. We should ask next after an express agreement. Lacking one, we should not go chasing haloes. We should, instead, ask whether or not the active party had done enough of what he agreed to do to earn his agreed reward. He agreed to ship goods of a certain description. Well, has he shipped? Or has anything supervened which makes it fair to throw risk on the buyer without the shipment?⁴² He agreed to hold specified goods until call. Well, did he? He was under duty to let the buyer inspect on demand. Is it reasonable to disregard that duty, in view of the supervening destruction?⁴³ If he agreed to hold until call, who should carry the risk, pending call?⁴⁴ If he agreed to deliver at destination, and has not delivered, how has he earned his price?⁴⁵ In the conditional-sales situation, after delivery, we do think thus,⁴⁶ and the commercial cases which make sense work out to such results. But of what assistance is the Title-concept in the working out, *when the case is not clear in advance*? And why, having discovered that risk of loss or damage has problems of its own, do we not settle down to thinking those problems through, as such? If we should, the effects of the thinking would clarify our Sales law much. And the effects would not be limited to Sales.⁴⁷ So much at least is clear: In a bona fide commercial deal in process of execution, the fact that either party has insured goods which have become specific should of itself warrant recognition in that party of insurable interest; and, if the other party has not insured, should of itself determine risk *pro tanto*. What have the presumptions of Act, Section 19, to do with this, except for tradition or arbitrary fiat?⁴⁸

A further and frequent hitch (as frequent as buyer's backing out) occurs when *the seller's performance is, in a material point, not up to his agreement*. In any other field than Sales, we should say without more ado: The buyer can either take it or leave it—with due qualification anent substantial performance.⁴⁹ And if

he takes it, he can have his damages for the defect. But in Sales we are embarrassed. Our accepted, and even statutory, theory runs in terms of "appropriation" of "*the*" goods to "*the*" contract, and of assent thereto by the nonappropriating party—whole lump or none again, for both at once.⁵⁰ Let me not linger on the older theory of "offer in full satisfaction," duly accepted and performed, which the Act under the combined influence of contract theory and of sense is now rather successful in removing from the legal scene.⁵¹ Let me rather recall three situations, all solved by most courts in rough, but interesting ways; all of which have, however, thrown Title-theory and Title-theorists into bafflement. On these points, decisions that are in fact consistent cannot be described as consistent, *via* the halo verbiage. They have to be described as contradictory, and some of them as wrong.⁵² Which means that the theorists' misdescription is not only cumbersome and inaccurate, but may at any time mislead a further court.

3. *Destruction in Mid-Delivery*

Wheat, contracted to be delivered into a vessel, is in process of being loaded. Before delivery is complete, it is destroyed by tempest. Can the buyer, as against the recalcitrant insurer, exercise an option to call the delivery good *pro tanto*, collect his insurance, and so to mutual satisfaction pay off his uninsured seller?⁵³ Common sense answers: "Of course! Why the pother?" But the insurer argues that Title never reached the buyer; until delivery completed, he had not assented to any appropriation of "the goods"; and no man, after destruction, can by mere act of will take halo-Title to now nonexistent goods. On this last, I gather that Williston would agree in general with the insurer. The court did not. But Williston approves the case because property had passed to the extent of the *delivery*.⁵⁴ Precisely what the court thought it was holding when it affirmed a judgment, by the

insurer who had paid buyer, against a reinsurer, I have never been able to determine. What seems certain is that its remarks on *property* having passed were hardly more than desultory. The recurring nub of the opinion is that the case turned on *insurable interest*—thus advancing the analysis yards beyond that in *Anderson v. Morice*, which had itself already moved from *property* to *risk*.⁵⁵ Insurable interest is found because the vessel was under buyers' control, because buyers would have had to return the partial delivery or pay, and because seller could not without buyers' consent regain what had been put on board. The delivery vested property from time to time as loaded, and at the time of the loss the partial delivery was at buyers' risk. (!) Buyers' option to return did not prevent their having an insurable interest. Their "interest" was defeasible at *their* option. That out of all this a modern writer should pick for emphasis only the passing reference to "property," which throws analysis not only back to Blackburn, but back beyond Blackburn's scrimmage line for a handsome loss, is hard to grasp. For all that is needed to avoid difficulty is to recognize that, as usual, the sum of interests which we know as Title is *divided* between buyer and seller during the process of loading, and to use the conceptual bridge thoughtfully provided by Bramwell as early as 1859 in *Langton v. Higgins*⁵⁶ and reasonably well rediscovered by Sir Barnes Peacock in the case in hand, to wit: that the buyer has power to claim, if he will, a delivery still imperfect; but also power to reject if and when delivery proves imperfect or incomplete. And it is needed to see the question not as one of Title primarily, but in first instance as one of *contract*. Bramwell in that case had announced (though in Sales language) a principle broader than Sales, one, indeed, which many sections of the Act accept,⁵⁷ one which lines up a goodly body of cases that at first sight might seem mutually inconsistent, arrays them along lines not only of solid common

sense but of broad, simple rule. Why should we discard such analysis? The task of law writing or legislation is to produce broad generalizations *which work out to satisfaction*. Failing that—and often as a preliminary to it—one needs differentiation. Neither is a sole solvent. Neither can justify itself, except in terms of fact and need. But one would have thought that, in the age of principle, such a principle would have been welcome. Perhaps it was, until it tangled with title-thinking. Title-thinking, Sales law viewed as property law,⁵⁸ possessed an intellectual vested inertia which even a sane and simple principle found it impossible to upset without due process of time. But English legislation (ignored by all American Sales scholars) saw sense, and did sense,⁵⁹ in the same year in which the Sales Act did not, in this particular: 1906. The story of the Factors Acts is parallel.

SELLER'S NONCONFORMING SHIPMENT

This leads into a second and broader disruption of the marketing process. Seller makes a patently nonconforming shipment and (to point the argument) it is no clerk's mistake, but principal's deliberation. Here orthodox theory runs into muddle, as is evidenced by almost any discussion, judicial or other, which one may pick up. If one is to think precisely, appropriation of "the goods" is out, wherever whatever goods are sent fail to conform to the contract description.⁶⁰ The best you can do is: "seller's attempt to appropriate *some* specific goods." Again, appropriation of anything "to *the* contract" is no less difficult to see, there being a deliberate breach—or shall I say defiance—of the contract obligation. Yet the bulk of the courts, and Williston in his first edition, have talked of appropriation by the seller to the contract, vesting title, but with power in the buyer to revest title on discovery of the breach.⁶¹ This gives trouble, though the trouble is often more aesthetic than practical. It raises difficulty on "the

goods" side where goods that do not conform get into trouble on the way (nonconformity appearing rarely on their destruction, but appearing often enough on partial damage or on attempts by creditors to attach). It gives trouble where goods conform but documents do not, though no deterioration supervene (as when the documents in a c.i.f. contract misdescribe).⁶⁵ The concept gives trouble, on the "appropriation" side, in the case, say, of shipment by an improper route and destruction in transit. But the trouble which the theory, if really taken literally, would raise rarely becomes practical because, *as between buyer and seller*, courts simply, by one route or by another, avoid its application.⁶⁵ Moreover, in his second edition, Williston observes cogently that there can be no wise implication of buyer's assent to a noncontract shipment (which applies equally whether it be noncontract as to kind, quality, manner, documents, insurance coverage, price demanded, what have you); and this is sense. But Williston proceeds to urge further that Title in such case will, therefore, not vest till buyer's acceptance: seller is perforce making a "new offer."⁶⁶ I think this an unnecessary and unfortunate addition. I cannot believe that the logical consequences would be applied by courts, in all their apparent implications—as, *e.g.*, that the seller's creditors, attaching before arrival, should defeat a buyer *who demands* the shipment.⁶⁶ Or that the seller itself, by virtue of its own breach, can effectually stop and divert the shipment,⁶⁶ although the buyer be the named consignee, be still solvent, and be now claiming. Or that any acquiescence at all by the buyer in the noncontract mode of shipment *per se* throws title and so every risk in transit onto him.⁶⁷

As in the preceding situation, what one has, in fact, is divided interest, with full Title in neither party. Again the situation is one essentially of contract and only incidentally one involving phases of property. Again the courts bunch decisions (even when

not their reasoning) with sense. What the judges typically *do*, today, whatever they or the writers may *say* about it, *is to give the buyer power to take the shipment, if he wants it: to take it moreover, as a defective performance referable to the original agreement and so entailing damages for the defect; but to reject it if he pleases.*⁶⁸ Risk remaining in consequence on the seller; the price remaining in consequence, during transit, still unearned. The orthodox theoretical difficulties involved in "the" goods and in appropriation to "the" contract the courts simply vault over. As well they may. For they are foolish difficulties; foolish, because once more they arise from seeking to locate an entire "Title" in one single party as a key to solution, in a circumstance in which both sense and the cases demand recognition of first, divided interests (in fact, and so in law), and, second, of one particular typical line of division of interests, to wit: favoring interests (especially the chance of market gain) being allocated to the nondefaulting buyer; disfavoring interests (especially risks of loss or rejection, etc.) lying almost entirely in the contract-breaking seller.⁶⁹

The orthodox theoretical difficulties arise, *inter alia*, from an antiquated overconcentration on the effect of consensual acts. It will be recalled what discomforts this approach entailed in the law of Offer and Acceptance, where it became necessary to meet difficult cases by ceasing to look for actual intent or consent, and turning instead to contract-without-agreement-in-fact in many situations in which an offeree had been reasonably misled by the offeror's expression. It will also be recalled that until theory cleanly accepted and articulated the "objective" standard of interpreting the offeror's expression⁷⁰—*i.e.*, while courts were still *talking* "meeting of the minds" but trying to *do* "reasonable outcome in the case"—there was confusion of language and occasional very dubious decision.⁷¹ It is argued here that that is one

phase of the present situation in Sales.⁷² We still *talk* Title and *talk* Assent to lump-Appropriation. That still makes sense enough in the uncontroverted or the easy cases. But doctrine needs equipment to handle the hard cases, as well. In those hard cases the courts are departing in result from the accepted orthodox approach, without yet having (other than spasmodically) concepts and language proper *either to express or to guide* the departures. Indeed, in the Sales field, the courts are even in certain cases treating the Assent aspect as to be wholly disregarded, on one side or the other. Certain types of prior action, notably the formation of an agreement for sale, may put a seller or selling outfit into a position in which his or its later acts will be referred to his or its existing obligation, whether he likes it or not, and even though he expressly repudiates the reference in advance. In other words, the sovereign power of breach is here and there in process of being limited in American law; a line of specific performance *at law* is becoming noticeable in the decisions.⁷³

NONCONSENSUAL "ASSENT"

This a third situation brings out even more sharply: *Seller is behind in its running account with Buyer*. Seller agrees to ship described goods, their whole value or part of their value to be taken in partial settlement of the existing debt.⁷⁴ Seller repents of the agreement; it ships, but it ships taking the bill of lading to its own order, and carefully attaching a draft for invoice price. Courts are now recognizing power in the buyer to cut under Seller's manifest attempt at repudiation and to get the goods, despite the patent absence of assent to any appropriation except on condition of prior cash payment.⁷⁵ Similarly, cases are appearing which give literal effect to clauses on order forms announcing that "This order cannot be countermanded," and holding the buyer to the price even though he gets notice of his repudiation

to the seller before "appropriation" has occurred.⁷⁶ These cases do not find favor with sales or contract theorists.⁷⁷

Now I have no convictions on the desirability of forcing all contracts into a base line of specific performance, nor of forcing specific performance through in the particular situations just instanced, nor even in the case of the clause suggested in footnote 77. Indeed, in the first case put above, that of the running account, I question whether all the decisions fit comfortably with those phases of the modern law of order bills of lading which I believe more wise and useful than their contraries.⁷⁸ And in the second case put, that of the "irrevocable order," I grow doubtful indeed about the wisdom of any power of differentially favorable contracting being allowed to rest merely upon a printed form prepared by one party (a Concentrated Business party) and put out upon a Mere Consuming Individual.⁷⁹ But doubts on wisdom constitute no reason for refusing to face the facts. The facts are that these two last lines of decision do *point a trend*. They point a trend toward recognition in law of the realities and needs of a *going* relation. The going customer-supplier relation is a fact, and a fact for lawyers to take account of—as, *e.g.*, they have taken (in part) of the current account relation between customer and banker. Even a single bilateral sets up a going relation. The instinct of the courts in frequently finding *modification* on facts which would not support *creation* of contract has been sound, though erratic; the judicial law of "waiver" is sane, and needs no such straightjacket as the American Law Institute *Restatement* attempts to give it in section 279. The law of consideration has a real function in the field of forming contract relationships, although there is plenty of overhauling to be done before our doctrine will accurately fill its function.⁸⁰ But the law of consideration, save for the antiholdup phases of the preëxisting duty rule, has no place in regard to *modification* of an existing rela-

tionship. *Whether* to start relying and expecting is often enough an arm's length matter; but once you are relying and expecting, adjustment, readjustment, are the other side of the reliance-coin. The law of accord and satisfaction, and substituted performance on its positive side, is a recognition of the facts of life; whereas Sales Act, section 49, is a recognition that such recognition should not open gate and door to the chiseler. Perhaps even more, the law of anticipatory repudiation shows—in most courts—appreciation of life's facts: that such law exists, either on the excuse side or on the side of active remedy, shows appreciation of what a going expectation-relation means; that an "election doctrine" can develop shows a groping not too unskillful for the true line of issue-drawing: how to keep a technically pure party from trading indecently upon the needed decencies.⁸¹ This is not the place to discuss anticipatory breach at large, but it is worth observing again not only that the existence of the concept implies a *going* relation, but also that the election doctrine depends upon a real cousinship to specific performance. (The "offered breach" idea even parallels our "assent" problem.) The aggrieved has power to *keep* the going relation (legally) a *going* one—to refuse effect to a breach. Our cases, above, carry just this idea forward into the title phase. They do point a trend.

They point a trend away from inadequate theory; nay, a revolt against it. Revolts commonly exaggerate; revolts also, however, commonly have a point. Here the point is clear: when courts which have been conditioned to regard the power of breach as the order of nature come somewhat persistently to disregard that power, then we need to recanvass our thinking both about the fact of power of breach in our legal system, and about the wisdom of our prior thinking on the subject. When courts *persistently* (not *consistently*) kick over any existing accepted theory, they may be wise or unwise, right or wrong.⁸² But what is certain is

that the theory which they persistently (whether or not consistently) kick over *must* be wrong, if it purports to be law for those courts.

To sum up, what I see in the situation in hand is, first, a recognition-in-action of a clear working principle: "Buyer's option, on Seller's breach," even in cases that affront the policy of seller's order bill of lading, and of assent as dealt with in Act, Section 19; and even though the result drives counter to all supposed common-law tradition against specific performance.⁸³ That is worth pondering. Indeed, it has value in making clear that the question "Specific Performance at Law—where and when?" is not academic, but is raised by the decisions.

The immediate bearing on our inquiry is no less clear: The "mutual assent to appropriation" attack on certain typical mercantile Sales problems breaks down. That lump simply fails to work. Do we Sales lawyers then analyze the problem? On the contrary. We leap instead into unexamined, groping application of another, albeit smaller, lump: Buyer's Option. Perhaps because it has not been phrased for application, and tried out over the years to find its proper limits, it is applied blindly, without reference to those limits. For such limits it has, as the last set of cases put suggests. Even a principle announced by as keen a Sales judge as Bramwell at his best⁸⁴ does not escape the need for critique and for limitation.

CONCLUSION

Harboring a suspicion that Sales Theory could learn more from the law of contract than it has, and that the concepts in that field ("the seller," "purchase for value," and the like) need reëxamination if Sales law is to be made an effective tool for the men who operate it or upon whom it operates, we have explored something of the mercantile phases of the field. The results indi-

cate that Sales situations are more complex than one would suspect from reading merely about the Seller, the Buyer, and the Goods; but, especially, more complex than one would suspect from reading merely of Title and Assent. One gathers, again, a suspicion that sustained inquiry into, let us say, sale of farm produce, or sale to ultimate consumer, or sale to manufacturing consumer, would turn up equally interesting need for rethinking how our Sales law works. One thing stands out, to baffle: the way, for over a century, in which the ideology of Title and of other cumbersome lump-concepts has defied or overcome suggestions, from within the field or from without, which offered high utility. Much has indeed been done in the Act—of which the companion papers seek to give evidence. But as much and more remains to be done. The Federal Sales Bill, with the amendments proposed by the Merchants' Association of New York, may prove a way out. It reached my desk too late for detailed discussion in this paper. It needs the addition, on the remedy side, of what is here suggested; it supplements, anticipates, and extends, with acumen and skill, many things which my students and I might (with luck) have later hit upon. But it also urges, in part, things I believe to be not fully thought through. A second thing stands out no less: the curious slowness of this branch of mercantile law, which one might have conceived to be peculiarly close to life—its curious slowness to adjust its doctrine and conceptual equipment to its needs. There is a third thing: over the long haul, the amazing skill with which judges have managed to work their cases out, despite the inadequate equipment furnished them by theory. I do not reason from this that adequate theory is unnecessary. I reason merely that we *can* further fumble on without it. A judge experienced and skillful enough, a judge with flair, can make out reasonably well with any tools, however clumsy, and with any guideposts, however

many-fingered. But ordinary judges and ordinary lawyers and young lawyers and law students will do better work if they are given better wherewithal than buttered mittens to sort and pick out those elusive peas known as wise decisions in cases involving Sales. Indeed, one can hope more. One can hope that a more exact equipment will make it possible not only to pick up the wise decisions more consistently, but to *cumulate* those wise decisions, instead of having them slither away again into the mass as so many of them have been doing these hundred years and more.

APPENDIX ON NEEDED AMENDMENTS NOT ALREADY
INCLUDED IN THE FEDERAL SALES BILL

To present a criticism of a statute without at least attempting to propose a cure is to fall down on the hardest job faced by the legal reformer. An exercise in drafting has here the additional value of helping to determine whether a number of useful changes in theory cannot be worked out within the confines of traditional language. Piecemeal amending is, however, a thankless task. Thus it would require overhauling of the Act to distinguish among "sellers"; though it does not require overhauling of the entire set of title sections to make practically effective change in Act, Section 63.

Yet something useful could be done by easing up the damage rule in at least the case most important to safe and fair commercial adjustment of a nonacceptance. Thus one might add to Section 64 (with an equivalent addition to Section 67):

"Section 64(3) (b). Provided, however, that if the seller has resold within a time and on terms mercantilely reasonable in the circumstances, the net price received shall be taken as the market price. The burden is on the seller, to establish that this proviso applies."

With this compare Federal Sales Bill, Merchants' Association amendment, Section 51, which aims more elaborately at a similar goal. Their proposed Section 55(3) will limit itself, in practical effect, to the case where no goods have been specified.

Other amendments likewise looking toward the easing of adjustment, as well as toward simpler litigation and fairer disposition of litigation, are suggested by Eno and Pilpel.⁸⁵ To complete the picture they need addition:

Section 49 [modified from Eno, after consultation]

(2) (a). The buyer who, before demand for a formal statement, gives notice of objections, may set up in any subsequent litigation objections whose omission from his notice has not actually, reasonably, and materially misled the seller, unless his statement, together with the surrounding circumstances, indicates that the unstated or then unknown defects were not really material to the rejection. The burden of proving actual, reasonable, and material reliance on the statement, and immateriality of the unstated defect, is on the seller.

(b) The seller is entitled, on demand therefor, to a formal statement of all objections readily ascertainable by the buyer at the time of such demand. Such statement will bar the setting up in any subsequent litigation of any defect unmentioned whose existence was not already reasonably ascertainable by the seller. Failure to reply to the seller's demand with a formal statement of objections within a reasonable time will bar the setting up in any subsequent litigation of all objections *not specified prior to the receipt of such demand*. [Suggested substitute: *which would have been barred by their omission from a formal statement, of either rejection or rescission.*]

Section 44(3). Where any or all of the goods delivered by the seller are [substantially?⁸⁶] nonconforming, the buyer may reject them all, or he may reject any of the nonconforming goods and retain the rest; provided that he notifies the seller, within the reasonable time specified in Section 48, of what goods he will reject, which notification is irrevocable; and provided further that the saleability of the part rejected is not materially impaired by its severance from the remainder. The burden of proving such impairment shall be on the seller.

Section 69(1)(c). Reject any or all of the goods, subject to the provisos of Section 44(3), either

(i) by refusing to accept them or part thereof if the property therein has not passed, or

(ii) if the property has passed, by rescinding the transfer of title to the goods or part thereof, unless he knew of the breach of warranty when he accepted them.

Rejection in either of these two ways shall not impair the buyer's right to damages for the breach of warranty.

It may, I think, be fairly urged that Pilpel has here done a more inclusive job than the Merchants' Association did in Federal Sales Bill, Sec. 60(1) (d).

The problems of appropriation by or after shipment can also be in fair part clarified:

Section 20(4) (2). Where pursuant to an order or a contract to sell the seller delivers or tenders goods to the buyer or, except in the cases provided for in the next rule of Section 21, where the seller so delivers them to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, this amounts to appropriation of the goods to the contract by the seller, or, in the case of an order, to acceptance thereof and also to such appropriation. Such appropriation is presumed to be unconditional and this presumption is applicable although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods whether or not the goods or the shipment are marked with the words: "collect on delivery" or their equivalent.

If such delivery or tender is referable to the order or to the contract to sell, but is not in full accordance therewith, the seller's appropriation is, at the buyer's option, effective as of the time when it was made; but the exercise of the option shall not impair any remedy to the buyer for breach of promise.

APPENDIX ON THE FEDERAL SALES BILL AND MERCHANTS' ASSOCIATION PROPOSALS

Section 5(1). A statute of frauds on matters involving less than \$500 is of dubious value. Cf. my *Materials*, 916 ff. The defendant's

risks are small, in a mercantile case. The reason for the statute drops out of sight, in the petty case; and the larger limit fits closer to those houses and transactions which already have business machinery to ensure confirmation. Finally, the fifteen-cent can of goods with fifteen thousands of claimed damage escapes even a fifty-dollar limitation: it has been delivered and "accepted."

Section 12. No substantial performance rule for nondocumentary contracts appears. This is very queer. Compare n. 86.

Section 12(3)(4). The Merchants' Association offers material improvements; but the last clause should read "no sale or contract."

Sections 15 ff. 15 gets off on a right foot. 16(4) is a material improvement. (See my *On Warranty of Quality, and Society*, II, 37 *Columbia L. Rev.* 341, 362 ff., esp. n. 58.)

But 15 should cut out the word "implied" wherever it appears. "*There is a warranty*" is the only proper language. I should add: "The warranty herein provided is not subject to negation." See *On Warranty, ubi sup.*, at 383-388.

Since state statutes may be expected to take up occasional matters which need particular control, it is unwise to cut out "of any statute in that behalf" in the preamble of Section 16.

Section 20. It gains, mildly, in clarity by the proposed changes. The addition in Rule 4(2) of "an order" to "a contract" is a notable forward step. The new Rule 5 fits convenience and sense. The excision of the original Rule 6 is, to my mind, essential to any intelligible purpose of the old, or of the modified, Rule 5.

Yet I regard my proposal *re Sales Act*, 19(4) (2), as a most useful addition to anything thus far available in regard to the Federal Sales Bill. See p. 108.

Section 21(3). I find it very difficult to grasp the shifting of risk under a cost-and-freight contract to the buyer (which I have no quarrel with) without provision for such notice of shipment as will enable the buyer to insure: see the proposed excision of Section 33(3). This

law professor thinks this particular combination proposed by the Merchants' Association to be distinctly unmerchantlike. He would regard an obligation to insure, for buyer's benefit, and at buyer's charge, as something to be meditated on with some seriousness.

Section 23(c). Swell. And goes far to clarify the new price-action proposals.

The omitted Sections on Documents of Title. See the companion paper on *Purchase for Value and the Course of Trade*. In rough summation: "Value" and "Notice" have been whittled too thin. The nub ought to be: Is this a course-of-trade transaction? This would distinguish, e.g., preferential transfer by Robinson of Jones's goods to Robinson's *banking* creditor from delivery by Robinson to Brown on credit, under the preëxisting mercantile contract. It would distinguish pledge of an order bill of lading from mortgage of an inventory. Certain sane lines of cleavage are indicated in the English Factors Acts, the Bulk Sales Acts, and the Trust Receipts Act. "*In the ordinary course of the transferor's business*" (cf. Sec. 5, Sales Act, 4) should be inserted into the definition of "Value."

Section 32. The Merchants' Association addition to (2) is bothersome in language: "if wilful and inexcusable" invites trouble. It also gets out of balance, as between seller and buyer. We still lack objective tests to guide practice in this field, but I would suggest such language as follows, as coming an inch or two closer to the mark:

"Where goods are to be delivered in separate installments, to be separately paid for, material default in either any delivery or any payment justifies the opposing party in refusing to proceed. If, after such default, and on demand by the party aggrieved, the defaulting party fails to provide, promptly, reasonably satisfactory assurance and security against future material default, the aggrieved party may cancel and sue for damages for breach of the entire contract.

"The burden is on the defaulting party to show that any default was not so material as to endanger confidence in later adequate

performance; and that any assurance and security offered were adequate to overcome any uncertainty, reasonably induced by the default, about adequate performance."

Section 33(3). See *supra*, under Section 21(3). 33(3) needs deletion.

Section 39. Where the f.o.b. clause envisages destination, one needs a further clause arranging for reasonable time to receive. It could perhaps be done by an addition to (c) along some such lines as these:

"and, if the place is the place of destination, until the buyer has been given a reasonable time to take delivery."

This is both case law and sense.

Section 43 *ff.* If the seller's remedy is to be worked out from Part IV, then Section 43 requires express extension by adding to (1): "*whether or not property in any goods has passed.*" Otherwise hopeless ambiguity develops between Parts IV and V. With such an addition, the Merchants' Association proposals do an adequate job on seller's remedy. It is needed. See especially Section 51(1)(b), as proposed. The proposed Section 55(3) raises a worry or two; but can be handled by any lawyer, and so does not need to bother.

Sections 58-60. Here there is a real and grave defect. The buyer ought to be given the same power and freedom to cover which the seller needs. To limit him *prima facie* to the market at the time of repudiation and the contract place of delivery means only one thing: to wit, that the buyer's problem has not been fully envisaged in terms of what he can *do* about it. The rules proposed are sound enough *where no actual covering has occurred*. They need an addition, to facilitate both negotiation and mercantile coverage. Something like this:

"A buyer who learns of a misdelivery or nondelivery may cover within a time and on terms mercantilely reasonable in the circumstances, and the net cost of cover shall be taken as the market price. The burden is on the buyer to establish mercantile reasonableness."

Given such a provision, a buyer can negotiate with his defaulting

seller with no more fear of the market than afflicts any business man; nor is he met in court, later, by the need of doing more than showing businesslike action.

It is nice, but in strong contrast, to see the proposed 60(7) giving the buyer just about this, if goods have been *mis*-delivered, instead of *non*-delivered. The conclusion is inescapable that the nondelivery situation has not been wholly thought through. For the intention to step up remedy, and to keep the buyer-seller relation in balance, is obvious.

The inclusion of damages, in the event of buyer's rescission, Section 60(1)(d), is needed. One would have been glad to see damages also allowed to follow recoupment as in England.

The net effect is that the Federal Sales Bill, with the Merchants' Association proposals, is a notable forward step in our Sales law. Yet the Eno and Pilpel proposals, and my own, would fill out the harmony of needed reforms. The remedy sections still need simplification.

NOTES

* References to "Act," "the Act," or to mere section numbers are to the Uniform Sales Act. References to "Williston" are to his SALES (2d ed. 1924).

A major indebtedness for help during the preparation of this paper (help not only in chasing or searching books, but in testing or suggesting ideas) runs to Henry Harfield, and especially to Soia Mentschikoff. Essays and research of other students, past and present, are noted where I am conscious of the debt; sometimes one absorbs, forgetting the source; and memory has a statute of limitations of its own. No less obvious is the obligation to Underhill Moore's thinking in the field, and, especially in the companion papers, to the most challenging material on our Sales law which I have seen in print: that from Nathan Isaac's pen. The debt to Emma Corstvet's detailed critique and correction is not obvious, because its results have been worked into every portion of the paper.

I should make clear that this paper, unlike its companions, undertakes no exploration of unfamiliar material. It relies heavily on my CASES AND MATERIALS ON SALES (1930), seeking to put together and expand much that is suggested in scattered portions of that book. Its aim is exploration rather of the possibilities of reweighing and realignment of cases and an Act which have grown so familiar that their meaning pales. For this I have no apology to make. Year by year, I find cases and statutory sections already taught ten or fifteen times taking new color, new light, indeed new shape, if one can forget how they looked last year and read them as if they were new. One should not, indeed, rest content with familiar cases alone; but it is worth-while putting down the things that they have come to mean. And it is gratifying to discover the extent to which the Merchants' Association of N. Y. has been thinking along similar lines. See App.

Another point needs note. I have tried, in dealing with the cases, to keep in mind place

and time. But even crucial cases are of two sorts. There are those which, a century ago, settled a then moot point in apparently permanent fashion, and whose underlying policy is as solid now as then. There are others which rested on shifting sands of condition and of policy. Such an issue as warranty to consumer, for instance, is still in violent flux, and a case may be outdated even within a decade. On the other hand Bramwell's announcement of buyer's option in 1859, or Blackburn's approach to risk of loss, is still prophetic. When, in this paper, doctrine spread over long time-stretches is compressed into a single doctrinal plane, that compression represents my deliberate judgment that the *particular* older cases concerned *deserve* to be treated as modern.

But I cannot say the same about the throwing together of cases from different jurisdictions. Occasionally such throwing together does represent deliberate judgment that the full backgrounds in the jurisdictions concerned are really and significantly alike. Very occasionally. More often, such throwing together represents acquiescence, for the moment, in the convention that there is *an* American law of Sales and contracts. All of us know that in any jurisdiction which has decided any point there has practically ceased to be an *American* common law on that point; there is instead the common law of Minnesota or of Washington. The convention of the writers persists, I take it, partly for business reasons: single-state lawbooks have not the market that "national" lawbooks have. And partly for reasons of inertia: it just takes too much time to get the requisite background, state by state. Partly, however, the convention foots on fact: The common lake of American decisions is a place to pump from when there is no water in any particular jurisdiction. But that is no reason for following the convention without detailed examination of its justification in the particular instance. It may be an excuse, but a first-year student knows that excuse is not performance. The present paper sins on this point; it has not the excuse of ignorance of the sin; it offers instead a fighting position: it is devoted to a critique of general doctrine and approach, and so must rest on the type of material out of which general doctrine and approach have grown. For there is at least this common factor in our "common law": Ideas and approaches to problems cross state lines even when precedent on particular points does not. Indeed, a new *common* law of Sales may be in process of reemergence, today, among the States—see *Warranty, II* (1937) 37 *Col. L. Rev.* 341, 381. But as appears in the text, it is destined to heavy subdivision and specialization in its application to persons.

If I were permitted, I should inscribe this essay, like its fellows, to Thomas Edward Scrutton—who for reasons of personality as well as circumstance has no such sin upon his scroll.

¹ On *Warranty of Quality and Society* (1936) 36 *Col. L. Rev.* 699, and 37 *id.*, 341, also revised under the title *Courts, Quality of Goods and A Credit Economy* and printed together with the third one, *Purchase for Value and the Course of Trade*, and this paper, in *Sales, Law and Society* (to appear).

² Title and Action for the Price will be discussed below. In the Act, Seller, as such, is opposed to Buyer, as such. Waite, *Retail Responsibility and Judicial Law Making* (1936) 34 *Mich. L. Rev.* 494, effectively challenges the lumping of all sellers, especially as to warranty of fitness in the case of food and drink, when he goes into study of the small retailer's peculiar position; and insists also on the consumer-buyer as a separate category. My own attack would be to broaden "food" into "articles for family—even factory—use" or the like, and to split "retailer" still further, into petty and large (department store; chain store). See Note (1937) 37 *Col. L. Rev.* 77. But differences of judgment as to what categories may be significant do not alter our agreement on the more vital

point: that the mere category "Seller" does not suffice to meet our needs. Isaacs's insistence on the marketing organization cuts into the "Seller" concept indirectly: In point of work done and ends sought and *business* (as distinct from legal) rights and duties, he sees Seller and sale merging into Principal and agency, etc. Isaacs, *Agents and Agencies* (1925) 3 HARV. BUS. REV. 265; *Business Security and Legal Security* (1923) 37 HARV. L. REV. 201. And particularly fruitful (compare my *Purchase for Value and the Course of Trade*) is his sustained demonstration that "Buyer" is a concept which no less needs subdivision of investigation, and often, in consequence, of rule. From the individual or family consumer who is Waite's concern, *supra*, Isaacs distinguishes *The Dealer-Purchaser* (1927) 1 U. OF CIN. L. REV. 373, and the industrial purchaser, *The Industrial Purchaser and the Sales Act* (1934) 34 COL. L. REV. 262. Isaacs does not convince me that the Act requires change, as distinct from careful recanvassing, in all the points raised. E.g., the "reliance" test of 15(1) seems to me to take care of preventing seller's liability where an industrial buyer lays down precise specifications. Cf. the division of the court in the borderline case of *Dunbar Bros. v. Consolidated Iron-Steel Mfg. Co.*, 23 F. (2d) 416 (C.C.A. 2d, 1928). But Isaacs's hammer not only hits nails, but finds unsuspected nails to hit, of which not the least is this: The subdivision of *Seller* need not *match* the subdivision of *Buyer*. It will be noted that Isaacs's emphasis is on that outfit which distributes goods consumer-wards—whether it appear in the particular situation as "seller" or as assembler of raws or of partially manufactured articles or of completed articles made for its brand. On the various Warranty concepts, see the one companion paper; on the need for subdividing Purchase for Value, the other.

³ Throughout the history of modern Sales doctrine (which can hardly be conceived as beginning before Mansfield) it has been contributing to and borrowing from the contract doctrine of the time being. Compare the effect of concurrent conditions on action for the price, *infra*, note 27. Throughout the same history it has been living whenever it chose in hermitlike isolation. Compare the rejection, in the Act, of the New York price rule—which was a *contract* rule. Until we learn the detailed history of both the neighborliness and its reverse, we shall remain ignorant of doctrine in both fields, and hampered in either developing or reforming it. For a beginning, cf. *Warranty* (1936), 36 COL. L. REV. 701, 726, 731, 743; 37 *id.* 341, *passim*.

⁴ There has also been some effort, in both companion papers, to inquire into what may be the reasons for things so unpleasant and perplexing; in that aspect those papers branch out into what may be considered sociology of law or the nature of legal thinking (at least in our system), and may raise the question how far similar things occur in other fields of our law. Here the analytical job is complex enough to force concentration on the results, as distinct from the causes of their being reached.

⁵ I cannot understand the difficulty found by the realists' critics in perceiving this, unless it be that the more general programmatic or controversial writings obscure those writings which really test the realist pudding; to wit, the monographic work in a specialized area, which either paves the way for better law or presents some portion of a way out. That the misconception is prevalent, see Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697, 700: "Faithful portrayal of what courts and law makers and jurists do is not the whole task of a science of law. One of the conspicuous actualities of the legal order is the impossibility of divorcing what they do from the question what they ought to do or what they feel they ought to do." Fuller, *American Legal Realism* (1934) 82 U. OF PA. L. REV. 429, 461: "... the cleft between Is and Ought causes acute distress to the realist. He sets about resolutely to eliminate it. There are

two ways in which this may be done. The Is may be compelled to conform to the Ought, or the Ought may be permitted to acquiesce in the Is. . . ." Again, at p. 452: "At the other extreme is the view that 'society' is the active principle and that 'law' is simply a function of this principle. . . . Llewellyn seems to me to place himself in this class." Cohen, *Justice Holmes and the Nature of Law* (1931) 31 COL. L. REV. 352, 357: "Many, however, of those who, like Holmes, reject the old confusion between law and morality, ignore his cautious qualifications and profess to do away altogether with the normative point of view in law. They make law synonymous with what people actually do, i.e., with social behavior." Or at 360: "It is the essence of positivism to view the law exclusively as uniformities of existing behavior, in total disregard of any ideals as to what should be." There are other passages from all three of the above which indicate appreciation of the values, so heavily insisted on by realists, of trying to get at the facts of lawmen's interaction with laymen; all three have, indeed, themselves contributed much to such attempts. The misconception lies in conceiving that any one thinks facts are *all* that jurisprudence is concerned with, merely because he cries out for needed facts or in a particular preliminary study tries to report facts as objectively as possible; or that any one conceives that all law has to do is to *follow* society because in a *particular* instance under discussion the following of society is urged to be the adjustment needed. For instance, one could argue vigorously in favor of the sane rule allowing the holder of a check time to present it through regular banking channels as determined by banking practice in his own city, while inveighing against certain regular abuses in the affiliate practice of the same banks, and crying out for investigation of facts to give light on whether or not and when certification of a raised check should protect a bona fide holder to the extent of the apparent face amount. I should do all three.

For further instances of a misconception, cf. Kantorowicz, *Some Rationalism About Realism* (1934) 43 YALE L. J. 1240; Dickinson, *Legal Rules* (1931) U. OF PA. L. REV.

For illustrations of fact-inquiries accompanied by conclusions on desirable change, see, in addition to various papers listed in (1931) 44 Harv. L. Rev. 1222, 1257, such studies as Corstvet, *Inadequate Bookkeeping as a Factor in Business Failure* (1936) 45 YALE L. J. 1201; Feinsinger, *Observations on Judicial Administration of Divorce Law in Wisconsin* (1932) 8 WISC. L. REV. 27; Note, *Collusive and Consensual Divorce and the New York Anomaly* (1936) 36 COL. L. REV. 1121; Schechter, *Fog and Fiction in Trade Mark Protection*, 36 *id.* at 1; Phillips, *A Practical Method for the Determination of Business Fact* (1934), 82 U. OF PA. L. REV. 230. A multitude of such excellent monographic studies are appearing from all over the country. See notably CURRENT LEGAL PROBLEMS.

⁶ On this, see the Warranty paper, Part II. The Introduction to my CASES AND MATERIALS, at xiv, improperly overgeneralizes its statement of the tendency (curiously enough, after carefully noting the distinction between mercantile and other cases anent "warranty"). Indeed, in discussing the waning importance of Sales law (Warranty, I, at 706) my argument should have been more explicitly confined to the mercantile aspects; for an excellent corrective, see the admirable collection of CASES AND MATERIALS by Bogert and Britton (1936), and note the degree to which the interesting problems they collect from the modern reports play around the farmer and the consumer.

Yet it needs noting that "conditional sales," which bulk ever larger in reported litigation, and promise to continue large in life, involve a consumer initially almost always in a contract for sale as to a chattel merely generically described, and also in a contract-after-delivery until the full price is paid. To Whiteside's figures, (1930) 16 CORN. L. J.

140, add *Mentschikoff's* (1936) 36 COL. L. REV. 706, n. 24. But at least the *selling* end of such deals is not only mercantile, but highly organized. See *Warranty, II* (1937) 37 COL. L. REV. 373 ff., 396 ff.

Isaacs might properly urge against this division that "mercantile" is no unified or uniform category. It is not intended as such. It is intended to indicate the limits *outside* of which this paper does not attempt to go.

⁷ See *Warranty, II* (1937) 37 COL. L. REV. 375 ff.; also Note, 37 *id.* at 610.

⁸ "Dealers" in the legal sense, including wholesalers as well as retailers or retailers.

⁹ When the modern law of sales began, real-property lawyers were familiar with legal title as distinct from equitable title; maybe they knew concept of equitable estate. They knew the mortgage, the equitable mortgage, and the mortgagor's persisting use-appreciation-risk-redemption interest. They knew the equitable charge. They had no hesitation in allowing a mortgagor "who did not have the property" to insure, yet Buller feels that a consignee of goods, to insure, must "have the property"; and "security-title" is a concept worked out most painfully in chattels, with muff upon muff after the ball had been thrown straight. The Act in Section 20(2) and 22 finally makes the analysis explicit. But the Act leaves us wondering about the nature of stoppage in transit, though realty models gave us legal powers of appointment, legal options on another's land, and innumerable "equities" as suggestions to work with. Again, after a contract to sell, the realty lawyers were familiar with enforceable rights in the prospective buyer, in equity, and with escrows at law; but working out "seller's effective appropriation, subject to a condition of payment," still bothers many common-law courts in the draft against order bill-of-lading cases. Nobody would doubt the power of an escrow-beneficiary to waive a noncompliance, but buyer's option after nonconforming shipment has been hard to grasp and is not explicit in the Act, save in cases like Secs. 7, 8, and 44, where the purpose seems to be rather to delimit than to affirm the option-power. The C. O. D. rule of 19(4) (2) is an almost perfect escrow-analogy. Good—but why stop with the one instance, if there appears point (*after due examination*) in generalizing?

Incidentally, the law of pledge had suggestions for Sales law. But the notions "one chattel, one owner" and of ownership as one single something withstood assault. *Cf.*, in comparison, the Notes in (1937) 37 COL. L. REV. 621 and 630.

¹⁰ Excellent on trust receipts is VOLD, *SALES* (1931) 341-372. Considerable modifications in the common law are made by the Uniform Trust Receipts Act.

¹¹ Cases on the effect of noncompliance with the statutes regulating motor sales (together with cases that have no perceptible bearing thereon) are collected in (1925) 37 A.L.R., 1465; (1928) 52 A.L.R. 701. On bills of lading in their effect between seller and buyer the cases are collected and analyzed in Note (1929) 29 COL. L. REV. 1100, where an effort is made to clear up the confusion of doctrine. How effectively the ancient armor of "intention" can turn even the shafts of statute appears when courts return to presumptions of the Sales Act, Section 19, variety despite the absence of any clause on "intention to the contrary" in Section 20, and the express exception of cases within that section from the rule of Section 19(4) (2). There emerges a lesson for the statutory draftsman: A semicode like a uniform commercial act should contain *one general* clause permitting variation by prescribed means of agreement and, in the present state of American statutory construction, might do well to open any presumption or in-the-absence-of-agreement section with "Subject to Section X." But certainly rules intended to be ironclad should contain: "No agreement to the contrary shall be valid." Compare the companion *Warranty* paper (1937) 37 COL. L. REV. 384 ff; 20 App. re Sec. 15.

¹² This much is certain: that in the conduct of a business the introduction of a check-up officer with access to books and records is felt by a debtor as a grievous strait jacket and by a creditors' committee as an important safeguard. And one hears that there is little need to resort to dirty work to discourage an outsider who gets a city contract but will not play the machine's game: one has only to inspect—be on hand, and inspect.

¹³ See Note (1937) 37 COL. L. REV. 621. Will Sales lawyers never learn that there are courts of equity? Or a law of Quasi-Contract? See Anderson in (1937) 21 MINN. L. REV. 529.

¹⁴ In the Acceptance cases, after *Adams v. Lindsell* had made its way. The reasoning and even the impulse on which the English cases rest fail in the light of our postal regulations. Yet the rule remains sound, if its functional basis be accepted: to wit, that in a régime of revocable offers, a decent division of market risks calls for sticking the offeree when he has moved into external action. For illuminating discussion, see Nussbaum, *Comparative Aspects of the Anglo-American Offer and Acceptance* (1936) 36 COL. L. REV. 920.

¹⁵ So BOGERT, COMMENTARIES ON CONDITIONAL SALES (1924). And the less scholarly handbooks are numerous.

¹⁶ Vold's *WOODWARD'S CASES ON SALES* (1933) xxvii, ff., cites papers by Dalzell, Frederick, Hanna, Taylor, Vold. One can add Gutteridge, Letters of Trust; the Uniform Trust Receipts Act, and on the latter the article by Bogert. See, more recently, Bacon's excellent *A Trust Receipt Transaction* (1936) 5 FORDHAM L. J., 17, 240. Djourup, *Uniform Trust Receipts Act with Annotations* (1936) 18 AM. ACC. BULL. No. 3, 1-16. Financing "needs" on turned-in cars are raising lobbying problems.

¹⁷ Work prior to FINKELSTEIN, LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT (1929), is cited there. See also Neidle and Bishop, *Commercial Letters of Credit* (1932) 32 COL. L. REV. 1; Thayer, *Irrevocable Credits in International Commerce: Their Legal Nature* (1936) 36 COL. L. REV. 1031; GROSSMANN-DOERTH, *DER ÜBERSIEKAUF* (1930).

¹⁸ Some of the literature is gathered in *Warranty, II* (1937) 37 COL. L. REV. 378, n. 96.

¹⁹ There are four questions—each essentially an open one of policy for its appropriate tribunal: (1) Can a tax be constitutionally laid on negotiations not resulting in a civil-law sale, but resulting in a contract for sale? (2) Does a statute authorizing a city to lay a "sales tax" authorize taxing such a transaction? (3) Does a city's ordinance taxing "sales" within the city cover such a transaction? (4) If yes, to all of these, is there discretion in an administrator to rule to the contrary; and if not, who can challenge his ruling?

²⁰ Take a situation in which "something remains to be done" under Act 19(2) or its common-law equivalent. On their facts *Sherwin v. Mudge*, 127 Mass. 547 (1879), and *Chenoweth Hardware Co. v. Gray*, 104 Ala. 236, 15 So. 911 (1894), have distinct superficial similarity: "sale" of a stock in trade; price in the first case to turn on inventory; in the other, excess to remain the transferor's property if the inventory exceeded the debt owing the seller's uncle, the transferee. A tax levy intervened during inventory in the first case, a creditor's levy during the other. Title held to have passed before levy in the second case; the contrary was held in the first. If one sympathizes with uncles and preferences, as against mere competing creditors, the cases give no difficulty in result. But I find difficulty in reconciling the tendency of the *Chenoweth* case with that of *Smith v. Sparkman*, 55 Miss. 649 (1878), and *Pierce Oil Co. v. Carroll*, 277 S.W. 220 (Tex. Civ. App. 1925) (bales of cotton "sold" for antecedent debt; before

they were identified and made fully ready for delivery, another creditor's attachment intervened successfully), and *Barton v. Trumbull*, 226 Mich. 685, 198 N.W. 186 (1924) [where the purchaser had even made advances on price to get the lumber out, but Act, Section 19(5) was surprisingly and unfortunately held to protect an attaching creditor of seller]. As I do in reconciling the tendency of these last with such cases as *Young v. Matthews*, [1866] L.R. 2 C.P. 127 (1,300,000 bricks "sold" against a debt; "this said quantity" to be held; three clamps pointed out "from which" the delivery was to be made; Erle, C.J., repeats the evidence as "all these bricks!" and the "buyer" beats the trustee in bankruptcy). For full discussion, see Note (1937) 37 COL. L. REV. 630.

These are hardly mercantile cases. Illustrations from the mercantile appear below. Compare the semimercantile case of *Warrick v. Lidden*, 230 Ala. 253, 160 So. 534 (1935), where the court avoids the statutory lien of a judgment by treating the interest of a pledgor of negotiable warehouse receipts as equitable, applies Sales Act rules to the sale of the pledgor's resulting "equity of redemption," finds the quantity "fixed" at 104 bales when the goods were to be weighed to ascertain the poundage, and so protects the buyer of the "equity" against the creditor. Head whirls, but result is sense.

²¹ Similarly in New York warranty. See (1936) 36 COL. L. REV. 699, 37 *id.* 341. Compare also LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* (1936). Radin, Moore, Oliphant, Tulin, Arnold, have, e.g., given illustrations.

²² See such cases as *Seaver v. Lindsay Light, infra*, note 35 or *Levine v. Hochman*, 273 S.W. 204 (Mo. App. 1925). The New York Merchants' Association even relies on the Seaver Case as support for its proposal to change the Sales Act, Sec. 58. See Appendix.

²³ See cases, notes 40-41, on destruction. Some judges not only understand but describe the process. So *Cresswell in Gilmour v. Supple*, 11 Moo. P.C. 551, 566, 14 Eng. Rep. 803, 809 (1858) (whom I take to be the *Cresswell* of the superb argument for the plaintiff in *Bryans v. Nix*): "It is impossible to examine the decisions on this subject without being struck by the ingenuity with which sellers have contended that the property in goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and buyers, or their representatives, have, with equal ingenuity, endeavored to show that they had, or had not, acquired the property in that for which they had contracted; and Judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances, it cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon very nice and subtle distinctions, and if some of them should not appear altogether reconcilable with each other." But *Cresswell* does not see that the solution lies in refining and subdividing not rules about the property-concept, but the property-concept itself. *Blackburn, in Martineau v. Kitching*, L.R. 7 Q.B. 436 (1872), while rejecting *Cockburn's* ploughland analysis of the case, reveals the finer type of judicial attitude: "As a general rule, *res perit domino* . . .; and when you can shew that the property passed the risk of loss, *prima facie*, is in the person in whom the property is. If, on the other hand, you go beyond that, and show that the risk attached to the one person or the other, it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable. . . . In the present case I think *all that is necessary to decide is, that the risk was not in the sellers*. When the first month had elapsed, and payment had been made, still the buyers had, from their express stipulation, a right to have the goods remain a month at the refiners' warehouse at the refiners' risk. Let us suppose that the refiners had become

bankrupt. If in consequence of the risk being in the refiners . . . the property was still in the refiners, their assignees in bankruptcy would take the entire property, and the buyers, who had paid the approximate price, would be obliged to come in and prove, and get so many shillings in the pound as they might be able to prove for. That would be a monstrous hardship, and *in such a case as that I should be very much inclined to struggle very hard to find any legal reason* for saying that, though the risk remained in the sellers, yet the property had passed to the buyers as soon as they had made the payment." Here is clean, narrow-issue thinking, and clean recognition of what a court is for; also clean recognition that *reasons* for decision must be "legal." I read that to mean: They must be very close to the accepted authoritative tradition. Results are another matter. A good many of the courts have been getting results—while making "reasons" for later courts a bit harder to find.—The italics are mine, in both passages.

With Blackburn's expressed foreknowledge of his own reactions, compare the actual reactions of the Idaho court in *Idaho Products Co. v. Bales*, 36 Idaho, 800, 214 Pac. 206 (1923). Contract, grower to produce buyer, for alfalfa hay in stack, "all of his strictly No. 1 merchantable"; delivery in stack or to the baler on the premises, buyer's option. To be paid as loaded at the ranch. Grower to insure; loss payable to buyer as its interest may appear. The grower labored in vain to get buyer to act, and then resold. The market rising, buyer sues for conversion. All that is necessary to decide the case is found in a few lines: The reasonableness of the time given to buyer to remove the hay was squarely submitted to the jury, and found against buyer. Contract or sale, this entitles the grower to rescission. But Budge, C.J., embarrassed between sense and *Sales* theory, actually perpetrated the argument that the insurance clause showed title *still* to be in the grower, since without title he could have no insurable interest—which does not make it easier when a case like that put by Blackburn next turns up.

²⁴ The procedure of apparent conformance to accepted rule can be accomplished only in two ways. Either the facts are squarely faced, and the inconsistency among the cases in applying the concept then becomes apparent, or the facts are manhandled, and the actual inconsistency in applying the concept is thereby concealed. The two courses lead equally into confusion. For in advising a client about action or litigation, or in facing a court in first instance or on appeal, we have as our tool kit (1) the seeming facts in hand and (2) the practice of the judges as recorded. Little else, unless it be a thing as yet too little studied to be standardized or even communicable: a *lawyer's* hunch. But if "the practice of the judges" in applying the concept is patently inconsistent, it amounts to no real *practice* on which prediction, and so guidance, can be based. Whereas if the facts will not remain stable in the judges' hands, no certainty that a single and consistent verbal formula will be uttered and "applied" can afford even that relative certainty of result which commercial lawyers have some reason to feel needful. (The interplay of rule and fact, and its relation to predictability, is examined by Jerome Frank in an overdrawn but stimulating paper, *What Courts Do in Fact* (1932) 26 *ILL. L. REV.* 645, 761. It must always be remembered that Frank had his eye on the trial court in a dispute; not on counseling beforehand.)

The individual lawyer worth his salt attempts to escape this trouble (which most individual lawyers—and judges—as they look to precedent for guidance, much more feel than know) by almost subconscious hunching. He gets an idea from somewhere that one line of argument will get over, whereas another line may not, or will not. Or, if counseling, he sees shoals and breakers worth skirting, on certain points, if skirting is possible, because he does not trust too much the seeming state of judicial

language. Why, he ordinarily finds it hard to tell. To some extent, this type of hunching is inevitable. It is much like the problem of lighting to a photographer, or of wind to a marksman. The photographer can use inventions testing and to some extent standardizing and charting the degree of light (as a physician can test hemoglobin rating against a standardized chart); but there is no chart to test the *incidence* of light. The marksman can find sights correctable for windage, and doubtless could transport a truckful of instruments for testing its velocity; but only his own hunch works in space between muzzle and target, or in time between trigger-pull and the bullet's arrival at (or not at) the mark. Apart from the *relative* simplicity of their technical problems, such persons have one tremendous advantage over the litigating or counseling lawyer: They have discovered what their problem is; and they are, and have persuaded others to be, at work on it. The lawyer has not been much concerned with demarcating where the area of lawyer's hunch begins, nor with the range and intensity of the hunch process in a lawyer's work. He is in a stage of technique in which a Steiglitz operating a pinhole-camera, or a Daniel Boone with bow and arrow, could indeed stand forth in glory and utterly transcend his medium—and be therein no less unique than glorious. I see no other adequate explanation for the unbelievable diversity in lawyer's adequacy, nor, especially, for the unbelievable prevalence of lawyer's inadequacy. For I believe the essential techniques to be not too complex for any person without mental handicap to master. I believe moderately workable teaching solutions to be also within the range of any persons who lack mental handicap, if pursued consistently over a period equivalent to what has led up to modern rifling, cartridge, and rifle-sight, or to modern photo-technical devices. I am thus led to believe that lawyers and law teachers have been tardy in studying their problem. More: I think they have been losing almost as much ground as they have been gaining. I give a single instance. The reports increasingly exclude even the points, much more the development, even in summary, of counsel's argument. Yet, for the training of lawyers, the arguments in, say, *Bryans v. Nix*, 4 M. & W. 775, 150 Eng. Rep. 1634 (Ex. 1839), are worth ten of the opinion. If counsel's argument were not a factor in the decision, moreover, the whole profession, save the judges, might as well abdicate advocacy. Yet such argument is only in the rarest cases even mentioned by writers as bearing on how a decision came about. And the factor of the leeway which is both due to and presupposed by counsel's argument, and of the probable effect of future argument within that leeway, is practically never touched on even in modernistic discussion of how cases *will* come out. This means that a known and necessary major factor of uncertainty in prediction has not yet even come in for serious study.

In the same way, but in an even more crucial area, that of judicial behavior itself, the problem has failed of study, as to how far and where *and why* judges continue blind use of inadequate concepts, how far they remodel such by finding useful qualifications or distinctions, how far they get results by distortions of the facts which leave the legal formulae seemingly unchanged. Once we are really awake to the area of unpredictability and to the types of variation that occur within it, we can set about the invention of what would correspond to light- and wind-gauges, and exposure or sight adjustments—and about testing out propositions about legal behavior which purport to correspond to any of these—and so somewhat to narrow the area of what is *de facto* becoming perhaps increasingly unpredictable, even while it continues *de jure* "certain."

²⁵ I do not regard the dominance of bargain in our economy as even remotely justifying passive acceptance by court or other tribunal of the letter of an "agreement" merely because a writing turns up under that label. Those once more or less fungible legal persons, *A* and *B*, or *S* and *B*, have ceased to be at all fungible in fact; and the

process of agreeing—which once implied not only meditation but room to choose and freedom within that room, not only choice but relatively conscious choice with some inkling of consequence—that process, thanks to differential use of forms, differential character of the forms used, differential knowledge and differential power in the “agreements,” has also ceased to be fungible in fact. This means need for control, lest old rules based on Adam Smithian postulates be made tools of outrage. And the problem presses. For some phases, see my *Legal Institutions and Economics* (1925) 15 AM. ECON. REV. 665; *What Price Contract* (1931) 40 YALE L. J. 704, 741 *et seq.* (the function of the law of consideration); Phillips, *A Lawyer's Approach to Commercial Arbitration* (1934) 44 YALE L. J. 31 (the business arbitrator's tendency to take the writing at its face); my *Warranty of Quality and Society* (1936) 36 COL. L. REV. 699, and especially *id.* at 393–404 (the need, *today*, for limitation of “agreement” expressions by stressing the nature-of-the-case)—with which contrast the troubles of such stressing where it is uninformed or difficult or blind: Note (1928) 28 COL. L. REV. 65, and Note (1933) 42 YALE L. J. 782 (on the patterning of queer corporate-security devices); and the “rigid” periods of our pleading history. Pound's notion of “status” as a vital working tool of our law, SPIRIT OF THE COMMON LAW (1921) 28–31, Isaac's appreciation of cycles in the treatment of contract and contract-patterns, *The Standardizing of Contract* (1917) 27 YALE L. J. 34, and Demogue's attack on “contracts of adhesion,” “Fundamental Notions of Private Law” in MODERN FRENCH LEGAL PHILOSOPHY, 472 and 477, are all valuable contributions to the working out of the problem. No simple solution will do. While, as a challenge to the “how far” of *even quite legitimate contracting*, we have Fuller and Perdue, *The Reliance Element in Contract Damages* (1936–1937) 46 YALE L. J. 52, 373.

²⁶ Cf. WHITNEY, SALES (2d ed. 1934) 79, 80. The American Bar Association version of the Federal Sales Bill even hoped to incorporate this rule. Sec. 20(6). The Merchants' Association rightly repudiates it.

²⁷ Not on the ancient precedents, reports Mentschikoff.

The original action for the price lay in debt, but without necessity for alleging performance by the seller, the theory being that the requirement of *quid pro quo* was satisfied by the seller's “grant” to the buyer of the right to sue in detinue. [Arnea, *Parol Contracts Prior to Assumpsit* (1909) 3 ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 304, 312, and 313. See especially cases collected in note 1, p. 313.] With the development of assumpsit and the doctrine of mutual promises as consideration, the seller retained this right to the price until the development of the doctrine of conditions precedent and concurrent. “Plaintiff need not to aver the delivery of the cow, because it is promise for promise.” (Nichols v. Raynbred, Hob. 89, 80 Eng. Rep. 238 (1615). Cf. also Strangborough v. Warner, 4 Leon. 3, 74 Eng. Rep. 686 (1589); Whitcalfe v. Jones, Moore K. B. 594, 72 Eng. Rep. (1598–1599), and Anonymous, 1 Lev. 88, 84 Eng. Rep. 311 (1663). Conditions precedent are not finally established in the law until Thorpe v. Thorpe, 1 Ld. Raym. 662, 91 Eng. Rep. 1341 (1699), and Lock v. Wright, 8 Mod. 40, 88 Eng. Rep. 30 (1722), whereas the development of the notion of concurrent conditions drags on until Mansfield's famous dictum in Kingston v. Preston, Loffts, 194, Doug. 659 (1773).—That a judge who could do that work, and that of Boone v. Eyre, had no opportunity to make clear, inside of “mercantile” cases, the difference between “warranty” in Sales and the same word in marine insurance, is a price the case-lawyer pays for judges' creation. I do not say the price is too high. I think it is not. *But I think it is reducible*—certainly, as a Federal Sales Bill pends.

²⁸ Note, however, that Fuller and Perdue, *supra* note 25, recanvass this “sane” base

line; and make one ponder. Yet my guess is that they will modify, not shift, my base line.

²⁹ WILLISTON, *SALES*, gives the older New York rule (§ 563), and indicates the relative spread of its acceptance in American courts (§ 564). He follows with a defense of the Sales Act choice, in Section 63(1), to which I probably do injustice. [§§ 565-573. See also Williston, *The Right of a Seller of Goods to Recover the Price* (1907) 20 HARV. L. REV. 363.] What that defense does not include is a careful canvass of the business and general economic bearings of the competing choices, nor a canvass of the procedural difficulties entailed in many states by providing two remedies mutually exclusive and "inconsistent in theory," nor a weighing of what type of damage admeasure is needed to balance the effects of limiting recovery of the price, in the ordinary case, to the old common count situation. The sections on the buyer's damages would help a little, if their theory were carried over. (§§ 597-600.) For a different attack on the problem see Waite, *The Action for the Price* (1919) 17 MICH. L. REV. 283.

Purely as a matter of construing language, one may note that Section 51 of the Sales Act could be made to open, together with 60 and 61, all needed remedies to the seller, wherever buyer's repudiation has not preceded seller's request that buyer take delivery, and perhaps even where it has. It remains for counsel to try out how far courts can be made to shift eyes from 63(1) to other sections. 63 does not state that it is exclusive. Nor would Fed. Sales Bill and Merchants' Assn. let (63) be exclusive. See App.

³⁰ Act, Section 63(3).

³¹ ENO, *Price Movement and Unstated Objections to Defective Performance of Sales Contracts* (1935) 46 YALE L. J. 782, and Note (1935) 35 COL. L. REV. 726, deal with other aspects of the law as it affects or hampers intelligent business adjustment of disputes on quality. See Appendix. Both have to do with what is in function a partial compensation for the unwise rule which holds a mercantile seller, as against a mercantile buyer, to the precise performance described in his agreement—a rule *not* applied, interestingly enough, to installment defects in their empowerment of cancellation. Act, § 45. To an uncommercial initial premise working against the seller is added a partially corrective and equally uncommercial set of rules on waiver by buyer, and on acceptance, which can work well enough as a balance weight where a buyer is ducking for extraneous reasons, but which can also work real injustice, and does, where the defects are material. The text deals with a similar maladjustment in function where the mercantile seller is offering adequate performance and it is the buyer who is kicking over.

Failure to diagnose who needs the court's help, and when, may explain the vagaries recorded in (1937) 37 COL. L. REV. 340, ff. Or even the failure of merchants to pull wholly workable results out of the muddle of circumstance. E.g., the Merchants' Association's failure to introduce substantial performance into domestic Sales law.

³² I do not believe anybody will ever work out an intelligible theory of these two sections. Fortunately, such cases as *D'Aprile v. Turner-Looker Co.*, 237 N. Y. 427, 147 N. E. 15 (1925), where the judges' aesthetics of the Act determine their votes, are rare indeed. The Merchants' Association moves vigorously to remove such doubt. See their proposed Sections 51, 52, 56 of the Federal Sales Bill.

³³ See Note (1935) 35 COL. L. REV. 726. *Re* decent buyers, *cf.* Eno, *supra* note 31.

³⁴ The language of Sales of Goods Act, § 50(2)(3), on nonacceptance, is literally that of 51(2)(3) on nondelivery. That of Sales Act 64(2) on nonacceptance is that of S. G. A. § 50(2). But Sales Act 67(2), on nondelivery, amazingly uses "the loss" instead of "the estimated loss." Sales Act 67(3) and 64(3) correspond to the dot with each other. Both differ from the English Act. The latter speaks of damages "prima

facie to be ascertained . . ." whereas the American Act substitutes "damages, in the absence of special circumstances showing proximate damages of a greater amount." Either this change is meaningless, or it deliberately attempts to narrow the English discretion. The case results accord with the latter alternative.

For the English application of discretion, buyers' actions under the equivalent language are thus as significant as sellers'. *Sharpe v. Nosawa*, [1917] 2 K. B. 814: on failure to ship c.i.f. from Japan or to forward documents diligently, buyer must be allowed time to consider—his duty being to buy on the same terms, if possible (which means room to try), or, if not possible, then to cover on the spot market. *Clemens Horst Co. v. Biddell Bros.*, [1911] 1 K. B. 214; on nonacceptance, *Hamilton, J.*, gave damages measured by contract price less the highest price sellers were able to get quoted when, after repudiation, they sought (which implies time) to resell on the same contractual terms. The House of Lords reduced this, following the Court of Appeal, to a shilling, [1912] A. C. 18: the sellers had failed to prove any substantial loss. This disregards the overhead cost of selling; which is not so good. Yet it looks not to any mechanical test, but to *loss*. "The same terms" is an excellent measurement device to *start* with, if one is allowed leeway to "consider"—and to try. *Payzu, Ltd. v. Saunders*, [1919] 2 K. B. 581: improper revocation of credit, and suit for nondelivery; defense that buyer should have covered at cash prices as offered by seller; buyer had the cash; judgment for £50 for "serious business inconvenience" affirmed. *McCardie, J.*, had felt "no inclination to allow in a mercantile dispute an unhappy indulgence in far-fetched resentment."

³⁵ Compare, for intelligent attack on the problem, such minority rulings as *Cook Mfg. Co. v. Randall*, 62 Iowa, 244, 17 N. W. 507 (1883) (nondelivery of carriages at Cincinnati for the Des Moines market; place of expected resale taken as the measure); with which contrast *Cahen v. Platt*, 69 N. Y. 348 (1877) (glass c.i.f. Antwerp to New York; action for nonacceptance; damages to be measured as of Antwerp). Or again, with *Seaver v. Lindsay Light Co.*, 233 N. Y. 273, 135 N. E. 329 (1922) (nondelivery on a contract c.i.f. Chicago to London, payment Chicago in advance: damages held to be measurable as of Chicago and time of breach), as developed by *Standard Casing Co. v. California Casing Co.*, 233 N. Y. 413, 135 N. E. 834 (1922) (nondelivery of pigs' guts, f.o.b. San Francisco for New York: the California market held to govern damages); compare *Perkins v. Minford*, 235 N. Y. 301, 139 N. E. 276 (1923) (sugar f.o.b. Cuba for New York, *B* to furnish vessel and insure, cash against documents; *B* sues for nondelivery of part, the defect being discovered on arrival. The court followed the blind "place where title was to pass" rule, but qualified the *time* to be when *B* knew or should have known of the breach. This helps, some. But *time for covering* is not allowed.) 2 WILLISTON, SALES (2d ed. 1924) 599, urges that the measurement of damages be at need dissociated from time and place of agreed passage of title. Wisely. The Act certainly leaves room for this. The trouble is only that its language gives no push to overcome judicial inertia. *Neither does the Federal Sales Bill*.

³⁶ See Clark's discussion in my *CASES AND MATERIALS*, 147 ff.

³⁷ A lovely example of the English practice in *Stein, Forbes v. County Tailoring Co.*, 115 L. T. R. 215, 86 L. J. K. B. 448 (K. B. D. 1916). The plaintiff sellers had "sued only for the price." They were not entitled to price. So: judgment for the plaintiff—for damages.

³⁸ See Fuller, *American Legal Realism* (1930) 82 U. OF PA. L. REV. 429, 441. But Fuller is wrong in believing that I had "failed to mention" the effect of the chance order in which cases arise and the doctrinal effects of that chance order. On the contrary,

in the same book he was reviewing, a section of the materials was arranged and annotated to develop the very point. *PRÄJUDIZIENRECHT U. RECHTSPRECHUNG IN AMERIKA* (1933) see especially II, 129, 134 ff.—Fuller's note 25, by the way, deserves prayerful attention by the student of case law in society.

³⁹ Of course, the careful seller or buyer whose organization contains some one aware of the difficulty can find the outline of an excellent and balanced solution in Garfield and Proctor Coal Co. v. Pennsylvania Coal and Coke Co., 199 Mass. 22, 84 N. E. 1020 (1908). Suggestions for pure pro-seller clauses can be found in *Wales Adding Machine Co. v. Huver*, 98 N. J. L. 910, 121 Atl. 621 (1923), with refinements on credit terms ably discussed in Havighurst, *Clauses in Sales Contracts Protecting the Seller Against Impairment of the Buyer's Credit* (1936) 20 MINN. L. REV. 367. But why should sane rules be limited to the use of the careful and informed who can afford to pay counsel who are also skillful and informed?

⁴⁰ 1 WILLISTON, SALES, 573 n., reasons thus, in full consonance with the tradition; see Blackburn, *supra* note 23. This has, at times, consequences that would have been distinctly undesired by the parties at the time of contracting, had they been foreseen. Business men do not ordinarily get specific about the location of Title. Indeed, when it comes to deliberate expression, as in standard forms, this absence of express "intention" on the whole lump seems to me wise. Whereas Isaacs is still wiser in indicating that since particular provisions (e.g., f.o.b.) may induce courts to lump Title-passing in undesired ways, such matters as recoverability of price, risk of loss or deterioration, security to seller, should *each* be contracted for in specie; so also should excuse, credit limitation, inspection privilege, or other right or remedy of buyer or seller. Isaacs points a moral: that if one does not do each specific job with adequate specificity, he may find undesired consequences hung around his neck. On the reasoning from risk see also Rosenberg v. Buffum, 234 N. Y. 338, 137 N. E. 609 (1922). Contrast Stein, Forbes & Co. v. County Tailoring Co. 115 L. T. R. 215, 86 L. J. K. B. 448 (K. B. D. 1916), sheepskins c.i.f. N. Y. to London "net cash against documents on arrival of steamer." The issue is that of the Buffum case: price after nonacceptance. The reasoning runs the opposite way; it also disregards the insurance line of argument used later in the Marano case, 41; nor does it mention the "on arrival" clause, which so frequently affects American sea-shipment cases. The problem the case raises is: Are Sales Act 20(2) and 22(a) (both lacking in the English Statute) necessary, in order to bridge out of 63 into allowing recovery of the price? That problem arises from lumping all aspects of title into one, despite the prior invention and the carry-over into the Sale of Goods Act of the *ius disponendi* concept, and the clean indications in *Miribita v. Imperial Ottoman Bank*, 3 Ex. Div. 164 (C. A. 1878), of the extent to which shipment reserving *ius disponendi* passes effective rights to the buyer. Again, *this time in England*, a clarifying and useful intellectual invention has been junked. But we have done the same. Cf. *Warranty, II*, 375, n. 85, and citations, n. 23.

⁴¹ So Cockburn in *Martineau v. Kitching*, [1872] L. R. 7 Q. B. 436. *Smith v. Marano*, 267 Pa. 107, 110 Atl. 94 (1920) illustrates the reasoning: c.i.f. shipment; customary insurance, not yet including war risk; sunk by submarine. *S* sues for price and recovers. The court's argument runs thus: the case turns on the point of "delivery." The cases show "property" to pass on shipment. Inclusion of insurance in price bars argument that *B* is to have "no interest" till arrival. (This is the concept lacking in *Anderson v. Morice*, 10 C. P. 58, [1874] described n. 53.) "The property" was retained for security only; hence the unforeseen and uninsured risk is on *B* under Sales Act 20(2) and 22.

Now add *Standard Casing Co. v. California Casing Co.*, 233 N. Y. 413, 135 N. E. 834 (1922), nondelivery of pigs' guts f.o.b. San Francisco, for New York, sight draft against bill of lading, inspection permitted on arrival. The reasoning is: from delivery for transit, to passage of title, to passage of risk, to completion of seller's performance on delivery for transit, to agreed place for such delivery as place of default, and so for measure of damages. The Marano case has no need to touch title, even to avoid 19(5); it would be enough that risk rests on the buyer by the insurance provision, and that the seller has done all he is required to do. The *Standard Casing* case unnecessarily decides a risk issue for purposes of becoming obscured by a mechanical device for measuring damages so that a commercially sane admeasurement of damages is excluded. In such a case as *Skinner v. Griffiths*, 80 Wash. 291, 141 Pac. 693 (1914), herring boxes to be delivered "f.o.b. scow Winslow or Seattle," and partially lost on the scow before time for loading aboard a barge in Seattle harbor had elapsed, the court sees the question as whether or not title passed when the boxes were delivered at the place and in the manner agreed upon, no stipulation having made inspection a condition precedent to the passing of title—and so renders a decision whose soundness no man can determine from the report. For any commercial man knows that "delivered f.o.b. scow Seattle" means job complete when goods are put aboard scow, if the delivery is intended from a Seattle wharf, but requires time for unloading, if the goods are to come to Seattle by scow. The opinion suggests that the latter was the fact, and, therefore, that the decision is unfortunate. If so, I submit that forgetting title would have helped mightily in reaching a wiser result; if not, that it would have helped no less in reaching a clearer one. Meanwhile, as indicated in the second Appendix, the point of Federal Sales Bill, Sec. 33(3) [original Act, 46(3)] risks being imperiled by Sec. 21(3)—a situation unthinkable if sound analysis of *Skinner v. Griffiths* were the order of the day.

It is not enough merely to avoid the Scylla of Title. What is needed is to chart the true course to the sane port. For instance, in *Cundill v. Lewis*, 245 N. Y. 383, 157 N. E. 502 (1927), we have a loss by theft. Camphor, identified, lies in a warehouse. Contract for sale, net cash in five days. Payment by *B* against a delivery order, March 21. Four days later, *B* paid storage charges to the warehouseman, without asking attornment. A nonnegotiable receipt was outstanding, in *S*'s hands, and called for "proper endorsement and surrender of this receipt" before delivery. The court allowed *B* to get the price back. It relied on no heavy nonsense about Title. It relied instead on Sales Act 43(3), which makes clear that the seller "has not fulfilled his obligation to deliver," when goods are in third-party hands, until attornment. Which is a good rule, and a pure contract rule. But the application of which to the particular case requires attention also to Act 22(b): where delivery is delayed through fault of seller or buyer, risk lies with the fault. This is another contract rule, and another good one, and in direct point to the issue of risk. And the problem of risk is the problem of risk, to be dealt with as such.

⁴² Act. § 22(b). Cf. also n. 35.

⁴³ One of the most baffling concepts in the law of Sales is the "condition precedent to the passing of title," with "inspection" as its main exemplar, which sometimes obscures both this problem and that of the action for the price after rejection. In the System of the law of Sales, this concept is a halfhearted and two-faced counterpart of the circles-running-on-circles which were resorted to in later Ptolemaic astronomy to make an inadequate first premise fit some of the facts which that first premise could not handle unaided. The inadequate first premise here lies in the lumping for discussion of a conforming and of a nonconforming shipment, with "title passing subject to rescission on

discovery." See *infra*, and my *CASES AND MATERIALS* at 393 *ff.*, 401. The condition precedent to the passing of title" (typically consisting of "inspection," but sometimes of "acceptance of title") has been repeatedly used in the same manner as has "reservation of title" by taking the bill of lading to seller's order": *i.e.*, it has been called upon, where the shipment did *not* conform, to work out *pro-buyer* results difficult to achieve under the "title passes on shipment" analysis. (For an excellent analytical attack on the cases in the order bill-of-lading matter, see Note (1929) 29 *COL. L. REV.* 1100, *esp.* 1108 *ff.*) Apart from "sale on approval" cases and odd cases such as *Agri. Mfg. Co. v. Atlantic Fertilizer Co.*, 129 Md. 42, 98 Atl. 365 (1916) (where it is, on one branch of the case, barely arguable that the agreement limited seller, in any lawsuit, to justifying his position by specific evidence which had become impossible to produce), the "condition precedent to sale" cases seem to bunch significantly around seller's nonconformity. There are, however, aberrations, and they appear sometimes in commercial transactions and at a point of real leverage. Compare *Larkin v. Geisenheimer*, 201 App. Div. 741, 195 N. Y. Supp. 577 (1922), in result, and its ideology as revived by *Glass v. Miroch*, 239 N. Y. 475, 147 N. E. 71 (1925): "The seller may not force the goods upon a buyer unwilling to receive them"—which is at utter odds with the effect of normal shipment under 19(4)(2) and 46(1). What is this magic of postponing the place of delivery, when sense calls precisely there, most of all, for the defaulting buyer to take the burden of redispotion? The Merchants' Association, as noted in the second Appendix, has here cut through "Assent" into sense. See their proposed excision of Rule 6 from the Federal Sales Bill, Sec. 20.

⁴⁴ *Isaacs, The Industrial Purchaser and the Sales Act* (1934) 34 *COL. L. REV.* 262, 269, regards Act, 19(1), where specific goods are contracted about but are to be held pending order to ship, as hard on an industrial (and, I should add, no less on a commercial) buyer whose insurance does not cover goods in warehouses of others. The same holds where setting aside occurs postcontract, "with the implied assent of the buyer." Of course, insurance by seller for buyer's account is always possible. *Cf.* the facts of *Berkshire Cotton Mfg. Co. v. Cohen*, 236 N. Y. 364, 140 N. Y. 726 (1923). But it calls for a special clause. There would certainly be much to be said for a rule that, in mercantile cases, risk should not pass, though title-for-purposes-of-price did pass, unless *seller insured to cover buyer* during any period in which, under the contract, seller retains control and holds at buyer's disposal. A half step, in a special case, in this general direction is found in Act, 46(3). Certainly *Tarling v. Baxter* 6 B. & C. 360, 108 Eng. Rep. 484 (K. B. 1827), for all its value in advancing analysis, is without much bearing on the policy of such a situation. Compare *Idaho Products Co. v. Bales*, 36 Idaho 800, 214 Pac. 206 (1923), also a case of stacked hay, note 23. The Federal Sales Bill is a bit roughhewn, though sound in base line, on the matter. See Sec. 23(c) as proposed by the Merchants' Association. The problem is clear; seller needs price, and is entitled to it; and buyer is defaulting. Neither should a seller who knows buyer is defaulting be put to risking further expense. Yet goods in S's control are not lightly to be lifted into B's risk, despite even Goble's lovely study in (1937) 37 *COL. L. REV.* 470. Is there no compromise, via mercantile goods insured for account of whom it may concern—and after request for authorization, at expense of buyer when it concerns him? The matter bothers me, as being one where Rules of Law (old or new) give too little *effective* guidance, even to counsel.—*Cf.* facts and *Blackburn*, in *Martineau v. Kitching*, L. R. 7 Q. B. 436 (1872).

⁴⁵ *Cf.* *Hunter Bros. v. Kramer Bros.*, 71 Kan. 468, 80 Pac. 963 (1905). Why, when obligation to deliver is clear, must Title get in the way? Unperformed seller's obligation

goes beyond risk to damages for nondelivery, and so includes all that Title can give, and more. The place of Title in such a picture is at points where goods which are delivered (or are specific) prove to show a defect in title. Act, Section 13.

⁴⁶ COND. SALES ACT, § 27. And Bogert's COMMENTARY thereon.

⁴⁷ For example, the definite turning of attention to risk forces closer definition of what risk one is thinking of. Risk of loss may be one thing, risk of deterioration another. Cf. SALE OF GOODS ACT, § 33. As risk of insolvency is one thing, and risk of dishonesty another. And the risks of unforeseen commercial or industrial difficulty deserve more attention than our cases on impossibility give. In THE COMMON LAW, Holmes marked out a line of prophetic thought: "The price paid in mercantile contracts generally excludes the construction that exceptional risks were intended to be assumed." P. 303. (Holmes can grow absurdly technical, and lose the thread of creation, as in those fraud cases where he finds "no contract," and thus no title even voidable. But when creative, he has never had a master.) The "subject to strikes . . . and other causes beyond the seller's control" clauses, which have become familiar, point in the same direction. I have seen no indication that their presence materially decreases the price paid, or is felt as a deprivation of extra insurance otherwise counted on by buyers. Isaacs, *Industrial Purchaser and the Sales Act* (1934) 34 COL. L. REV. 262, at 270, points out that some buyers are beginning to balance (or overbalance) by their own forms full of pro-buyer clauses, but here, too, I lack evidence that such clauses affect the price. Leaving the matter to clauses does result, however, in penalizing little men where bigger outfits bargain out; and this is not wise lawmaking wherever the level either of factual expectation or of commercial decency is such as to make the clauses normally desirable. It is of interest that German law recognized most of our current seller's exemptions, without explicit clause. It is of double interest that the Scandinavian legislators, though their general attack on commercial law distinctly followed the English model, found this phase of our contract-law too much to stomach, and incorporated the exemptions in their code. Anglo-American judges, however, including even Scrutton [*Bourgeois v. Wilson, Holgate & Co., Ltd.*, 25 Com. Cas. 260 (1920)] are only beginning to feel their way into consonance with need and sense on the point. For in contract law such lumps as "promise," "consideration," and "legality" can distract attention from the fundamental issue quite as well as "Title" can in Sales. Note again the problem in intellectual history. Both the need and the technical road out (constructive conditions) are made clear by 1881, in a peculiarly famous book by a peculiarly famous judge—indeed, for him who cared to look, they had been made clear a century earlier by another judge of curiously similar personality. Holmes builds on Mansfield. The last War brought up a series of drastic cases to point the moral. But "serious commercial difficulty," as a line of thinking about "excuse," goes down before the analogies derived from the "frustration" idea.

⁴⁸ Williston recognizes part of this: where there is an agreement between seller and buyer as to insuring for the benefit of one of them. 1 SALES, 695; also that risk and property may part company. § 302 ff. But it cannot be said that the idea of severing risk and Title appeals to him. Blackburn's clear-eyed approach to risk problems simply as such is classic, and repeated; it recurs; it recurs in famous cases; for all that, it is almost consistently disregarded. In three wholly distinct types of situation he vigorously refused to be misled by arguments from title. *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 332, 33 L. J. Q. B. 214 (1863); *Martineau v. Kitching*, L. R. 70 B. 436 (1876); *Anderson v. Morice*, 10 C. P. 58 (1874): "It may be observed that risk and property generally go together [in the easy cases], and consequently in many of the cases, though the important

point was, at whose risk is the thing, it is treated as if the sole question was, whose property is it? *In the present case, however, the real question was, whose risk was it?*" (Italics supplied.) I think, in this last, that there was a further step to take. See text, p. 97, and notes 53 and 23 *supra*. But Blackburn's sharp, crisp analysis invigorates.

If legal dogmatics is a science, one is free to admire technique, even while challenging one or another premise. Indeed, one is free to admire *the lines of premise* chosen even while disagreeing with the *particular premise* chosen. Blackburn, Bramwell, and earlier, Mansfield, and later, the by-the-Law-of-England-crippled Scrutton, raise a question. Namely, this: if Mansfield (whatever intervened) could be followed by a Bramwell and a Blackburn, *and built on*—for they did that—then why is Scrutton sterile? I mean sterile in *result*. I feel this man to be the greatest commercial judge who ever sat in English-speaking countries. I think that clear. He outranks even Mansfield. You have only to read him. Yet he indulged "judicial self-limitation" when Mansfield would have rolled up his sleeves and gone to work. It may be that times had changed. Some of my students urge on me that an era of consolidation of law had proceeded to arrive. As in the American situation from 1890, say to now, among gentlemen who happen to be lawyers, or vice versa. But before my eyes remains this figure, Scrutton—who could have taught Bramwell and Blackburn, and who had courage that Mansfield never could have conceived, as well as a sensitivity to commerce which had no need of Mansfield's merchant-jury. An American revolter struggles like a diver in strange waters as he attempts to work out an understanding of why this genius in commercial law saw the better, and then bowed to the worse, as being *the Law of England*. But again; one is free to admire technique! I think, also, one is free to admire sense of duty. For my part, I would give my one eye, and perhaps both, to have had Scrutton as chief on the Exchequer Bench between 1820 and 1860. Read Scrutton (William Harrar has studied his commercial opinions in an essay that cries for publication) and then read Parke, C. B., and the matter is plain.

May a "jurisprude" hazard an opinion which runs *pro sua domo*? I guess that Scrutton's sense of decency had been hamstrung by a tradition, derived I know not whence, that judges just stayed put. "I have said nothing about the results being just, because justice is not what we strive after in the Courts . . . if you mean by justice some moral standard which is not the law of England." This is a libel of Scrutton on Scrutton. He *did* strive after justice, and twist the law of England to that end. But it is even more a truth, because Scrutton felt that law to bind him with a singular bindingness and strove with all his strength to fight down any urge to alter it, unless he saw a loophole. This was not the tradition of the nineteenth century, through Bramwell and Blackburn. Nor had it been Mansfield's. Something happened, between; else Scrutton would have moved. Moved, despite the statute. The attitude of English judges toward the Factors Acts gave precedent enough. And Scrutton knew well how to use precedents with an Aye, when they had eyes, with a Nay, when they neighed. Hence: here is a gap in English legal history. The perfect exemplar of the man who ought to innovate grows curiously slow in innovation. "Trimming?" You do not know Scrutton. When Scrutton had prejudices, he voiced them and so got rid of them. No. Something which cripples judges has happened, rather recently, in the British judicial system. What? It is merely a symptom that the Court of Appeals has changed its doctrine, and now regards itself as "bound" by its own decisions—even when they are distinguishable. *Taylor v. Oakes*, 127 L.T.R. 267 (C.A. 1922).

⁴⁹ On substantial performance and Sales law see Note (1933) 33 COL. L. REV. 1021; Note (1935) 35 *id.* at 726.

⁵⁰ Act, §19, hallows the tradition. The acts of "appropriation" are almost always done by the seller. In contracts for sale, the buyer's assent is almost always "implied" because no buyer's representative is present. Difficulty arises when the buyer is present, as in tender at destination, when "refusal to accept title" may enter to complicate the picture. See note 43, *supra*. Where no "implied assent" of the nonacting party is found, the orthodox analysis proceeds on a basis akin to the orthodox law of offer and acceptance, but gets into confusion between technique and justice when it comes to interpreting the seller's "offer-in-breach-of-contract." See Note (1937) 37 COL. L. REV. 610.

⁵¹ Act, §49. The saving of buyer's rights is introduced by "in the absence of express or implied agreement of the parties." Williston's text makes it clear that the words were intentional; which is, with respect, a little queer, since *implied* offer in full satisfaction was all that the worst common-law cases had argued. But the courts have paid little attention to the introductory clause—fortunately, in this case. More troublesome is the meaning of "other legal remedy" in the section. Even the draftsman deals with it primarily in terms of action for damages. Does it apply equally to power to cancel for material breach in an installment, or is it limited to the damagelike recoupment? In the one case, one quarrels with inadequate phrasing; in the other, with policy. See also second App., *re* Sec. 32, and the Warranty paper.

⁵² Typical is 1 WILLISTON, SALES, 578-9, n., 580, n.

⁵³ Colonial Ins. Co. v. Adelaide Ins. Co., 12 A. C. 128 (P. C. 1886). Anderson v. Morice, 10 C. P. 58 (1874), was there distinguished on grounds on which that case had carefully tried to avoid resting, grounds too technical to satisfy or to give certainty as to the outcome of the next similar case. (I personally believe that on the point of insurable interest the Anderson case was overruled, and, on that point, will be confined to its *exact* facts.) Blackburn's opinion in the Anderson case is, however, notable for its explicit insistence that *risk* may pass with full loading of "the cargo" contracted for, even though "full property" may not have passed; and that the words "the cargo" contain no necessary magic about risk, since bag-by-bag passing of risk may be arranged, even without an explicit clause to that effect; and in taking risk rather than title as the crucial matter. What it overlooks is that risk was *not* the issue of the case, as it would have been in seller's suit for price, in which the buyer could properly insist on complete performance. The issue was *insurable interest*; and buyer's option to take an incomplete performance (plus his factual interest in the venture) affords an ample basis for recognizing such an insurable interest. More interesting still is Bramwell's concurrence—for it was Bramwell who sixteen years before had made the buyer's option clear.

Contrast such a case as Rochester and Oleopolis Oil Co. v. Hughey, 56 Pa. 322 (1867), where the issue was *really* risk; can seller recover the price of partially loaded oil, after its destruction, against his recalcitrant buyer? Held, and properly: no. Blackburn's ghost, finding these cases dealt with at large on the "issue" of property, might well remember certain words of Carroll: "I said it very loud and clear. . . ."

⁵⁴ Sales, §277. VOLD, SALES, 200 *f.*, makes the Colonial Ins. case turn (as the court does in part) on the buyer's having chartered the vessel, delivery of the loaded portion "to the buyer" having occurred; and where this is not the case, insists that *nothing* passes to the buyer till the delivery to the carrier is complete, there being then nothing to show assent to piecemeal appropriation. The insurance aspects of these cases

would seem to have since been covered by practice, and in the buyer's favor; else the matters would have been litigated into clarity—that is, in the United States. For England, see note 59 *infra*. Apart from the treatment in the texts cited, the treatment in the casebooks is significant. Lewis (1929) (an excellent job, his collection, though I do not like arrangement around the Act) quotes it purely on the question of "delivery," with a "but" to the *Rochester* case *et al.* 371, n. Williston and McCurdy (1932) quote it merely to distinguish the Anderson case. 190, n. VOLD's WOODWARD (1933) gives the holding accurately: "an insurable interest," gives two of the three grounds adduced for distinguishing the Anderson case, and quotes an "insurable interest" sentence along with the property sentence. Bogert and Britton disregard the case. Llewellyn, in 1930, had only digested its facts and reasoning, and tends today toward repentance for not printing the report in full.

⁵⁵ See n. 47, and 53.

⁵⁶ (Ex. 1859) 4 H. & N. 204. "In all reason, when a vendee sends his ship, or cart, or cask, or bottle to the vendor, and he puts the article sold into it, that is a delivery to the vendee." This is the language that seems to have drawn the attention. The likening of bottles to ships (the "buyer's receptacle" idea) is enough to show that Bramwell was still groping. Bottles, sacks, boxes are one thing. Carts are another. Tank cars owned or leased by one party or the other are a third. But chartered vessels raise problems different from all three. Williston properly criticizes Bramwell for "finding" a "delivery" here. There was no real delivery. But the creative part of the opinion remains: "Suppose the oil of peppermint had been badly manufactured, I am not prepared to assent to the argument that the plaintiff [a buyer-financier-mortgagee] would not have had a power of rejection. *Again, suppose only a portion of the oil had been put into the bottles, inasmuch as the plaintiff was not bound to take a part only, would the property vest?* Aldridge v. Johnson is an authority on that point. It may be that the plaintiff would have the option of refusing to take a part only of the oil or of accepting it, but *that right is not inconsistent with the property vesting at his election.*" (Italics supplied.) It is a natural progression to carry this thinking from property forward into risk (which would work for the buyer), and again from risk forward into insurable interest (which would work for the buyer again.) Aldridge v. Johnson has well prepared the way. And appropriation at the buyer's option, ambiguous in that case, ought to have been perceived as unambiguous in Anderson v. Morice.

⁵⁷ The fundamental section is 11, coupled with 49. Other sections, especially those relating to quantity, presuppose 11 and 49, and somewhat limit the buyer's option: 7 and 8; 44 and 46(2) make special express repetition of the option. 46(3) does not. I read "promise" in 11(1) as including all the "duties" on the seller laid down in Sections 41-47, 13-16. Section 69(1) (c) seems to repeat 11, in favor of the buyer, on the condition side, adding a possible damage action; 69(1) (b) seems to repeat 49, first sentence, or else they conflict. 61(1) (d) makes the buyer's option clear, even when title is held to have passed, as the language of 69(4) and (5) ("elects to rescind the sale") reinforces. All of this becomes clearer in the wording of the proposed Federal Sales Bill. On the quasi-contractual aspects, see Anderson, *supra* note 13.

⁵⁸ Even Vold's text and his WOODWARD's CASES, and Bogert and Britton's cases, cling in arrangement and analysis essentially to this point of view. What does, I think, appear, is increasing *feel*, in the choice of cases, for significant facts and their influence—in which regard both collections are admirable—and, more hesitantly, a somewhat greater

tendency to hammer on the seller's *contract* as needing examination before one turns to his acts of seeming appropriation.

⁵⁹ THE MARINE INSURANCE ACT, 6 EDW. VII, §7 reads:

"(1) A defeasible interest is insurable, as also is a contingent interest.

"(2) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise." Cf. also § 14 (2). Is our case-law doctrine impervious to hints?

⁶⁰ Whether the "description" be by words of contract, words of representation, sample, blueprint, the nature of the case, or other line of implication. The FEDERAL SALES BILL, Sec. 16(4) and 17(d) attempts a not wholly complete clarification. I attempted one equally unsatisfactory in (1937) 37 COL. L. REV. 364, n. The need is clear.

⁶¹ SALES (1st ed. 1909). §§473, 474. For typical judicial language: "If the goods are not up to the sample, the right to refuse them exists, which is, in effect, a rescission. The title passes upon delivery to the carrier, subject to this right, of which the purchaser may avail himself or not." *Kuppenheimer v. Wertheimer*, 107 Mich. 77, 64 N. W. 952 (1895).

⁶² Interesting instances in *Gillespie Bros. v. Thompson Bros.*, 13 Ll. L. Rep. 519 (C. A. 1922); *Finlay & Co. v. Kwik Hoo Tong*, [1928] 2 K. B. 604. The same problem arises under any defect of quality, payment having been made against documents before arrival of the goods. Here blunt Title-analysis goes haywire. Compare 2 WILLISTON, SALES, 1237-8, n. Most of the cases there cited *act* sense. Thus the English cases, although their Act repudiates rescission for breach of warranty, permit rejection under a documentary contract when the goods prove, after documents have been taken up, to be nonconforming. This is sound law, under SALE OF GOODS ACT, Sections 11(1) (c) and 35, which deal only with acceptance of goods. It is necessary commercial sense. The best American case is *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349 (1889). Of course throwing back the goods and desire to sue for damages are rarely coupled, since commonly even defective goods will be taken on a rising market; but where the goods are flatly unusable, either a dealer-buyer or an industrial purchaser may need the action for nondelivery, and should not be deprived thereof by false analysis in terms of title having passed and of rescission being the sole available remedy. Williston here undercuts for documentary contracts the whole point of his remarks on nonconforming shipment.

1 SALES, 585, 587; 2 *id.* at 1237. The curious thing is—and it shows how firm a grip Title can take across a good Sales lawyer's eyes—that the technical way out is suggested in the note directly across the page, which speaks, anent a concealed defect in seed, of a delivery "conditional only, the contract to remain executory." Similarly, there can be payment that is tentative or conditional only, and documents in the buyer's hands which he can hold at option, having, indeed, power to transfer [as even a buyer without title has, under Section 20(4)] but which have been taken on a constructive contractual condition that there is no prejudice to buyer from acting on the seller's implicit assurance (by taking money against them, under the contract) that the goods will be found to conform both to documents and to contract. The courts hurdle the theoretical difficulty by talking rejection where necessary, and by giving incidental damages along with return of the price, even when talking rescission. See Note (1935) 35 COL. L. REV. 726.

⁶³ So, especially, where goods or shipment-manner run counter to the agreement, by insisting on seller's order bill of lading as reserving title, and so risk: compare Penni-

man v. Winder, 180 N. C. 73, 103 S. E. 908 (1920); and cases cited (1929) 29 COL. L. REV. 1100, 1102-3; or by finding a condition precedent to passing of title in some inspection clause: compare Wall Rice Milling Co. v. Continental Supply Co., 36 Utah, 121, 103 Pac. 242 (1909); and on both lines of operation compare note 43 *supra*. Less frequent is clean-cut reanalysis to meet the case of nonconforming goods, as in Libman v. Fox-Pioneer Scrap Iron Co., 175 Wisc. 485, 185 N. W. 551 (1921). The situation that would force reanalysis, to wit, rejection plus a nondelivery claim, is rather rarely presented.

The courts' instinct has been somewhat less certain where claims over, for damage or destruction, were concerned (in the United States, especially against railroads) and the defense was skillfully presented that title at the time of the damage was essential to the claim, and that under Sales rules such title was not in the present plaintiff. So Kleinhans v. Canadian Pac. Ry. Co., 203 App. Div. 715, 196 N. Y. Supp. 862 (1922). The business reasoning (convenience of adjustment) and the general policy reasoning (speed and cheapness of adjustment) run here as in the cases on insurable interest, *supra*, especially notes 44, 47, to wit: Let whichever takes the loss as against the other be free to make the claim over. That the UNIFORM BILLS OF LADING ACT largely cures the situation, see Watts v. Norfolk So. R. R., 183 N. C. 12, 110 S. E. 582 (1922).

The North Carolina cases (collected by Leon Malman) present a fascinating study in the struggle of sound judicial instinct against technical stumbling blocks. (I leave the "Ry." in the titles as it came to me, although my own practice runs *contra*. There is real dramatic power in its repetitive impact.) "The other party is the only proper plaintiff" dominates the scene in Asheboro Mfg. Co. v. Ry., 149 N. C. 261, 62 S. E. 1091 (1908) (for a while the local leading case); Parker Buggy Corp. v. Ry., 152 N. C. 119, 67 S. E. 251 (1910); Elliott v. Ry., 155 N. C. 249, 71 S. E. 339 (1911); Ellington v. Ry., 170 N. C. 36, 86 S. E. 693 (1915). Restiveness of the court, and technical twisting to avoid technical defense, appear as early as Wilkins v. Ry., 160 N. C. 54, 75 S. E. 1090 (1912). In 1916 mercantile views begin to prevail: Myers v. Ry., 171 N. C. 190, 88 S. E. 947 (1916) (where buyer's failure to get an order bill of lading properly indorsed is the ground of nonsuit). In Adylett v. Ry., 172 N. C. 47, 89 S. E. 1000 (1916), and Trading Co. v. Ry., 178 N. C. 175, 100 S. E. 316 (1919), a technical device appears which does the necessary work, even without statute: consignee's adjustment with consignee is made to amount to an "equitable assignment" of consignee's claim against the carrier. Then come the BILLS OF LADING ACT and the Watts case, *supra*. And in Anderson v. Express Co., 187 N. C. 171, 121 S. E. 354 (1924), the court holds almost a military review of its resources for keeping Sales rules from interfering with a suit against the carrier for loss, damage, or delay. For cases in other jurisdictions see (1929) 29 COL. L. REV. 1100, 1104-5.

⁶⁴ 1 SALES, 585, 587; and the implications of 2 *id.*, §474. How the language on 587, so far as it deals with prior "contract" (as distinct from buyer's mere "order" or "offer"), is to be reconciled with ACT, Section 49, and WILLISTON, SALES, §§ 484a ff., escapes me.

⁶⁵ On which point cases like Aldridge v. Johnson, 7 El. & Bl. 885, 119 Eng. Rep. 1476 (Q. B. 1857), and Langton v. Higgins, *supra*, with their semi-"delivery" aspect seem to me more persuasive than the type of case symbolized by Andrews v. Durant, 11 N. Y. 351 (1854). Had it been decided in any state lacking the Lanfear v. Sumner rule, Low v. Pew, 108 Mass. 347 (1871), would be a clean authority against the prevalence of the view I urge as likely to prevail in fact. Among modern cases, note the diverse tendencies evidenced by Procter & Gamble Co. v. Peter White Jr., Co., 233 N. Y. 97, 134 N. E. 849

(1922), and *Craig Brokerage Co. v. Goddard Co.*, 92 Ind. App. 234, 175 N. E. 19 (1931). But let a *shipment* once get off to the buyer, without contract for delivery at destination, and the divergence in tendency would cease.

⁶⁶ Cf. *Lynch Davidson & Co. v. Denman Lumber Co.*, 270 S. W. 225 (Tex. Civ. App. 1925); *Greenwood Grocery Co. v. Canadian Elevator Co.*, 72 S. C. 450, 52 S. E. 191 (1905) (in both cases *dicta*); and note *infra*. I read the nonrecovery by the buyer of certain cars, in the *Procter & Gamble* case, 233 N. Y. 97, 134 N. E. 849 (1922), as turning on absence of shipment to him. A more conventional and somewhat treacherous phrasing would be: absence of "delivery."

⁶⁷ See *Lamborn v. Seggerman Bros.*, 240 N. Y. 118, 147 N. E. 607 (1925) (documentary contract for a 1,200 case carload of apples; delivery order covering 1,200 cases out of a 1,770-case carload paid for without objection; yet recovery by buyer of the price paid, after government had seized the carload).

⁶⁸ Often, but by no means always, almost the same treatment is accorded to non-shipment cases. *Aldridge v. Johnson* and *Langton v. Higgins* may once have stood on "buyer's receptacle" notions, though I doubt that that is their present-day meaning. But cases involving apparent present sale of misdescribed goods challenge attention hard to evade. A defective performance is there referred to a contract "performed" on seller's side when made. The buyer has been allowed to reject or rescind, one cannot tell which. *Hawkins v. Pemberton*, 51 N. Y. 198 (1872, Com. App.). The Act permits him to rescind title-and-contract together. § 69(1) (d). That he can at his election keep the defective goods and have damages has not been doubted for a century.

Now, an exciting phase of these cases, shipment or nonshipment, is that Sales here contributes its bit toward exposing the inadequacies and exploding the fallacies that lie in certain phases of the orthodox theories of Offer and Acceptance, and of Consideration—at the same time showing that Contract, for all its huge value, is no full key to Sales problems; certainly not, in the present condition of accepted contract theory.

Let the facts of *Powers v. Dodgson*, 194 Mich. 133, 160 N. W. 432 (1917), serve as an illustration. Seller offered specific but absent wool. Buyer answered: "If there ain't over 300 lbs. [of fine wool in the lot] I will give you 25-½ cents." Accepted. But there were over three hundred pounds of fine wool. At this point, I think it clear that (1) *B* has not in any normal sense assented to appropriation of anything as *against* himself; and (2) that whereas he can have the wool and damages, if he wants them, despite *S*'s most desperate efforts to get out, (3) he need not take the wool. As in the case of "sale on approval" (what obligation on the buyer's side?), the standard Law of Consideration goes into the discard. Here, either *S* is obligated (e.g., to deliver on tender, or to procure any bailee's attornment) while *B* is not, or *B* is obligated without having received the explicitly bargained-for equivalent. Something, then, is wrong with orthodox theory of consideration or with the obvious outcome. I hold with the latter. The case itself I do not wish to discuss in detail here save for this: that it is a magnificent example of strong-arming a sound result out of an impossible given theory by rough and ready mayhem and surgery. ("How can Your Honor decide that way?" says counsel in one of the favorite and throat-chuckled yarns of Taft, C. J. The Court answers, "By main strength!") The Federal Sales Bill moves toward making this main strength statutory. Sec. 20(4) (2) "order or." Is case-law doctrine still impervious to hints?

Indeed, on the offer and acceptance side, the most frequent case runs in terms of an order to ship, followed by prompt shipment of goods which do not wholly conform. If buyer takes the goods and sues for nonconformity, any modern citizen unspooled by

the accepted pseudo-law of counteroffers and unilaterals would agree that such buyer should recover, for seller's failure to perform. If the defect was latent, even unilateralists would turn to some theory of "the passing of title" (to what? to *what?*) having been "called for," so as to work out a recovery for him. *Common-sense* contract theory would recognize in such a case that any shipment really referable to the offer was acceptance-and-breach together, and that the seller was bound though buyer was not—just as common-sense reading of the offer would recognize that it called, implicitly, *in the alternative*, for either a reasonably prompt shipment or a reasonably prompt promise to ship with reasonable dispatch. To explore the extent to which the cases conform to such common sense on this will require a paper in itself. It will appear. Meanwhile, it is obvious that wherever orthodox offer-and-acceptance doctrine is argued to the court, the court must either duck, squirm, manhandle the facts, or do injustice. PAGE, *CASES ON CONTRACTS* (1935), gathers what to a Sales lawyer is a surprising collection of decisions that do this last. One of the easiest outs is to treat notification of a shipment already made as if it had been a promise to ship in terms of the order. What makes the situation peculiarly interesting here is that when the nonconformity lies in *words* (such as disclaimers of warranty tagged onto bags of seed) the orthodox offer-and-acceptance doctrine may overwhelm Sales sense; just as when nonconformity to *prior* contract lies in a demand of excessive price before delivery, the "voluntary-payment" line of cases so often knocks on the head the statutory hope of SALES ACT, Section 49. But, as Kipling remarks, that is another story.

⁶⁹ I owe to Bruno Schachner the idea that title has *lines and planes* of cleavage akin to those of crystals.

The nub of this can be fitted somewhat into orthodox Sales terminology. We already know the concept "Security-title," which recognizes that some, or much, or most of Title can pass, leaving a limited body of rights behind. This concept one might call division of *Title*. Without explicitly *dividing* Title, moreover, we have already become grudgingly familiar with splitting from it such attributes as risk, or the power of stoppage, or lien. I propose that one might split with equal ease the concept "*pass*." Indeed, we are already familiar with such splitting of the legal *process* of the passing. We differentiate consent of the seller from consent of the buyer, and either can come first, and either can be "implied." Can we not then go on to *recognize* the existing split in legal *effect* of their so-called "consents"—especially when those "consents" are at odds, or absent? To recognize that title can pass *as against* the seller, in these cases of nonconformity, without passing *as against* the buyer, would come moderately close to stating both sense and case results in traditional terms. It would not be wholly adequate phrasing. It would emphasize only one of the lines of cleavage. It would obscure the possibilities of a real contract analysis. It would fail to point such issues as *leviability*, and who can recover from a carrier, and when will a penal statute operate, and who can transfer to some type of purchaser for value. But it would help greatly. Indeed, on all the property phases, such phrasing would further materially the clean-cut introduction into Sales theory of that *inter partes* v. third party distinction which, though present here and there and everywhere in Sales doctrine, has yet to be organized and integrated there as it has been in Agency or in Bills and Notes. Cf. Note (1937), 37 *COT. L. REV.* 630.

⁷⁰ Subject always, as Oliphant used to point out, to limitation by the offeree's *subjective* understanding, where *he* had facts that the ordinary reasonable man did not have, to see that the objective expression was not intended to convey all it seemed to say.

⁷² The picture is presented by following *Cook v. Oxley*, 3 Term R. 653, 100 Eng. Rep. 785 (K. B. 1790), through the later reports. That case, in attitude, is pure "meeting-of-the-minds." *Adams v. Lindsell*, 1 Barn & Ald. 681, 106 Eng. Rep. 250 (K. B. 1818), is a beginning into "reasonable expectation"—though, on its exact facts, it seems obvious that it would today be differently decided, for the circumstances of the offer-letter gave the offeree utterly no grounds of reasonable reliance. The curious case of *Dickinson v. Dodds*, 2 Ch. Div. 463 (1876), shows meeting-of-the-minds conceptions still at work, with results that, if they were frequent, would be really unsettling: What rumors about revocation is an offeree to trust, when he cannot reach his offeror?

One major place of true-consent views today is in the situation of the mistransmitted offer. But its revivification there occurs, I suspect, under peculiar stimulus. *Ayer v. Western Union*, 79 Me. 493, 10 Atl. 495 (1887), for instance, proceeds first upon a ruling that the telegraph company's clause of exemption from liability in its contract with the offeror was *not* binding. When such clauses become binding upon the offeror, the *Ayer* case becomes troublesome, however strictly it may be in accord with modern "general contract theory" (concerning which see *RESTATEMENT, CONTRACTS*, § 23). The run of cases which are cited as rejecting its rule [*COSTIGAN, CASES ON CONTRACTS* (3d ed. 1934) 210] needs detailed study. How great a proportion of them are successful suits by an offeree against a telegraph company, under circumstances which would bar suit by an offeror, if the *Ayer* rule were followed blindly? And *must* the problem of recovery against an agency at fault tangle up the law of contract between the parties? See an excellent Note (1937) 37 *COL. L. REV.* (May).

⁷³ One phase only. For in the law of "express" warranty, the objective contract theory finds expression. *ACT*, § 12. It really lies at the base of Section 15(1), and, in most cases, of 15(2). Indeed, it lies (as a theory) at the base of the bulk of the "presumption" rules in the *Act*. They seek less to lay down controlling rules than to standardize, on the basis of the most general practice discoverable, the probable meaning of the acts or words concerned, to most bargainors concerned, and to give effect to that meaning. Only subsidiarily, it seems to me, do they seek to solve for the parties problems about which those parties would have had hardly a guess, or two-wayed guesses, had the problems been presented to them at the time of dicker. And this, in my view, is the sound basic approach to regulative law about socially unobjectionable transactions which can be reasonably standardized, and where bargaining power is moderately balanced or fair dealing is the practice. At times a different approach is needed, as where an overdevelopment of automobile theft leads to new and noncustomary regulation of procedure in sales of second-hand cars, with possible effects even *inter partes*. See Notes (1925) 37 *A. L. R.* 1465 (1928) 52 *A. L. R.* 701. But all transactions must be conformed to the more necessary forms of policing.

⁷⁴ Waite, *loc. cit. supra* note 29, as does Williston, *The Right of a Seller of Goods to Recover the Price* (1907) 20 *HARV. L. REV.* 363 points out that that action is also in effect for specific performance, a fact that cannot really be obscured by tidilywinking a Title onto or into the buyer, or refusing to. The facts are: a broken contract, in which the seller has done most of his part, and full recovery after buyer's repudiation; which means specific performance.

⁷⁵ In the cases about to be put, the debt was a *commercial* one, and the two parties had been in a *going* relation of which the transaction in dispute was but one incident. How important that going relation was becomes unmistakable in *Rudin v. King-Richardson Co.*, 37 F. (2d) 637 (C. C. A. 7th, 1929). But not at all dissimilar is the letting

down of the bars on "appropriation" which repeatedly appears (and repeatedly does not appear) where the buyer has financed the production (e.g., in lumbering, canning, farming) or even where the matter is merely one of preferring one old creditor. General examination of cases of these two types indicates that the situation makes itself felt strongly enough to throw the application of orthodox Sales concepts almost into unpredictability, but not strongly enough to substitute for them any other line of predictability. Perhaps studies made state by state, with an eye to time sequence and the detail of the facts, would give more light. I doubt it. I suspect the uncertain results to indicate almost pure groping, because the situation is *seen* as Sales, but often *felt* to be security (almost always favored, in emotion) or preference in insolvency (as to which emotions divide according as the judge pictures the general creditors or some specific creditor as adversary). For excellent discussion see Notes (1937) 37 COL. L. REV. 621, 630. Compare the companion paper on *Purchase for Value*.

⁷⁵ Banik v. Chicago, M. & St. P. Ry., 147 Minn. 175, 179 N. W. 899 (1920). Has any one ever commented on the curious pro-buyer leaning of the Minnesota court through the years? To the cases collected in my CASES AND MATERIALS, Index by Jurisdiction, add Wilhelm Lubrication Co. v. Bratrud, 268 N. W. 634 (Minn. 1936) discussed in (1937) 37 COL. L. REV. 309.

Illustrating the trend noted in the text: J. L. Price Brokerage Co. v. Chicago, B. & J. R. Co., 199 S. W. 732 (Mo. App. 1917); Rudin v. King-Richardson Co., 311 Ill. 513, 143 N. E. 198 (1924). And cf. the Miribita case, *supra* note 40.

⁷⁶ Lewis v. Scoville, 94 Conn. 79, 108 Atl. 501 (1919). Renne v. Volk, 188 Wisc. 508, 205 N. W. 385 (1925), to the same effect, is seemingly repudiated in Knight & Bostwick v. Moore, 203 Wisc. 540, 234 N. W. 902 (1931). But in accord with the Lewis case: Jonesboro Compress Co. v. Mente & Co., 72 F. (2d) 3 (C. C. A. 8th, 1934). It will be noted that once a contracting has been accomplished, such clauses as that in the Wales case, note 39, produce the same effect re price as the no-countermand clauses. The latter float both consideration doctrine and title doctrine; the former float only the last. Yet parties are commonly regarded as in control of the remedies in their contracts, even though Act, 63, contains no "unless otherwise agreed" clause; but the "day certain" clause shows that agreement is to do some controlling. Cf. *Warranty*, II (1937) 37 COL. L. REV. 384 ff. and 393 ff.

⁷⁷ Especially, not the cases overriding seller's repudiation. The Rudin case, with general citations to other cases, appears in two footnotes in WILLISTON AND MCCURDY, CASES ON SALES (1932) 291, n., 331, n.; it appears in a footnote in Bogert and Britton, 459 f., solely in relation to replevin and levy when an order document is outstanding, and there is no citation of, e.g., the Banik, Price and Greenwood Grocery cases. Woodward in his second edition thought the case important, as I did. Vold's *WOODWARD'S CASES* prints the case, with annotations none too full, and no comment. Neither is there any comment in *VOLD ON SALES*. But see (1924) 24 COL. L. REV. 931; and on the Lewis case, (1920) 19 YALE L. J. 689.

I venture to predict that on the order document point—i.e., replevin when an order document is outstanding—the Rudin case will not survive. But on the buyer's power point—as will be evidenced, e.g., by replevying the document in the hands of seller's agent—it will march on, despite Sales theorists. I suspect the same fate to await the price-despite-repudiation contracts, once they get drawn in persuasive form. As a technician, I should like to see what would happen to something like this: "The price under this contract is agreed to be due at the expiration of the agreed credit term, calculated

from the date when seller ships or offers to ship the goods; but should the buyer mail or otherwise communicate his intention to break the contract, the seller may cancel the credit term and declare the price due at once." Cf. Federal Sales Bill, Sec. 23(c).

⁷⁸ My doubts and suggestions appear in the companion paper on *Purchase for Value*; they were foreshadowed in the TRUST RECEIPTS ACT.

⁷⁹ Compare *supra*, note 25, and Warranty, Second Part. Bogert, Hale, N. Isaacs, M. Cohen, Pound, all have an eye to the problem. But it is still to be really canvassed. I think its real canvassing will revolutionize our ideas on Offer and Acceptance, Consideration, Statute of Frauds, and Integration—*inter alia*.

⁸⁰ Llewellyn, *What Price Contract?* (1931) 40 YALE L. J. 704, esp. 741 ff.

⁸¹ Note (1937) 37 COL. L. REV. 610.

⁸² Fuller gives a beautiful illustration: put an animal in an enclosure too small or badly shaped to hold it comfortably and it will struggle to get out. You cannot predict the result; you *can* predict the struggle. Fuller, *supra* note 5, at 437. In a word: inadequate legal theory makes for uncertainty in the results of legal cases. In transaction-law at least, this is a heavy debit item.

⁸³ This discussion centers, it will be recalled, on *mercantile* transactions, and here, on mercantile cases involving *shipment*.

The phrasing in the text requires qualification along two major lines:

(1) It has only dubious application to the "deliverable state" cases when goods are still in seller's possession. See notes 44, 56. Note that such cases raise the point of buyer's *option* almost exclusively when the buyer either has financed production of the goods in question or is, as a creditor, on other grounds, attempting to secure a preference, *and*, in either case, when the seller has become insolvent, *and* when certain goods were originally or have later become specified to the contract. Such issues as price and risk test, of course, not buyer's option, but seller's right. The older common-law cases of financing-buyer against bona-fide-purchaser are under the Act to be settled under Section 25, which, on the facts of most of the common-law cases, would make a decided difference in result.

(2) The text also has only dubious application to cases where delivery is agreed to be at a point distant from the seller. The text ought, indeed, to apply without qualification to those cases and as soon as the seller tenders or offers delivery. It ought to apply in favor of seller, where the goods conform; in favor of buyer where they do not. But the seller seems to have full power to divert before the goods arrive at the agreed point. Between arrival-time and time of tender or offer, the situation is not clear. If, as in the normal c. i. f. contract, both shipment and tender of documents are required, the buyer's option as against the seller will operate from the time of shipment.

Cf. FEDERAL SALES BILL §20(5), and the Merchants' Association proposal to excise (6).

⁸⁴ Bramwell epitomizes in himself the growth of Sales law in England, as Cowen (see the companion paper, Part II) epitomizes the warranty law of New York over an equal period. When Bramwell is *seeing*, he can see more prophetically even than Blackburn. But I do not recall ever seeing Blackburn in a commercial case as muddled as Bramwell was in *Household Fire Ins. Co. v. Grant*, 4 Ex. D. 216 (C. A. 1879). The point in which Bramwell sums up the century is in his magnificent ability, even when seeing straight in general, to ignore his own prior insights. Compare his opinion in *Anderson v. Morice*, 10 C. P. 58 (1874), with that in *Langton v. Higgins*.

⁸⁵ (1934) 44 YALE L. J. 818, and in (1935) 35 COL. L. REV. 739.

⁸⁶ On substantial performance, I find that some such language as the following, working as a change in Act, 11, so as to pervade the entire Act, lures me:

"Any promise or warranty, so far as concerns damages or recoupment operates subject to this act precisely in terms of the agreement made. So far as concerns rejection or rescission by the buyer, it is not the promise but the condition which controls. The seller's performance shall be deemed substantial and so to be in compliance with the condition resting on the seller whenever, disregarding any supervening change in the market, the delivery offered would reasonably have met the buyer's operating requirements and an appropriate reduction of the price would have served as adequate compensation to the buyer for failure of exact performance. In the case of goods sold for non-business consumption, even minor defects going to the taste of the buyer and in the case of any goods sold for use even minor defects going to efficiency of the operation of the goods and in the case of documentary sales or contracts to sell, even minor defects in the documents are presumed to negate substantial performance. The burden of proving substantiability of the performance rests in all cases with the seller, excepting language written (not merely printed) into the documents or memorandum of agreement, such as '90 per cent delivery guaranteed' and the like makes full performance of the language by the seller a condition."

THE GROWING FUNCTION OF EQUITY IN THE DEVELOPMENT OF THE LAW

WILLIAM F. WALSH

THE purpose of this article is to outline the more important contributions of equity to the development of the common law prior to 1835, the establishment of equity in the United States, and the more important developments of equity since that date. Equity had its origin in the need to remove deficiencies and to correct faults in the common law, and its development from century to century has been an almost continuous and most potent movement for the betterment of Anglo-American law, directly by the extension of specific relief where damages at law were inadequate, and indirectly by bringing about many of the forward steps in the growth of the common law.

REFORMS IN THE LAW ACCOMPLISHED BY EQUITY PRIOR TO 1835

We need not elaborate on equity's direct contribution to our legal system, as that would be simply to list all equitable rights and remedies. Its indirect contribution to legal growth by inducing reforms in the common law has not always been recognized or appreciated, and therefore it will be summarized very briefly here as an introduction to a more detailed examination of that part of the growth of the law during the last hundred years which must be credited to equity.

Though the jurisdiction of chancery as a court was initiated about the middle of the fourteenth century, the real establishment of equity as part of the English legal system was accomplished in the fifteenth.¹ That century was to equity what the

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thirteenth was to the common law. Second in importance only to the development of uses was the relief which equity established in the fifteenth century in cases of parol contracts (including contracts in writing not under seal) where the action of debt would not lie. The law gave no relief, since the only remedies at law in contract cases were covenant, where the contract was under seal, and debt, where an indebtedness for a liquidated and precise sum was established. Equity gave full relief in these cases usually by way of specific performance but also by way of damages in the form of restitution or reparation, in this way initiating the modern law of contract involving the recovery of unliquidated damages for breach of promise. The extensive way in which equity gave relief in these cases is conclusively established by Professor Barbour as the result of his examination of a large and representative number of the existing three hundred thousand petitions to the chancellor made from late in the fourteenth century to early in the sixteenth.² There can be no doubt that this new law, developed by equity so as to include all kinds of parol contracts common to the period, was the impelling cause of the development of assumpsit at law. The development of assumpsit by the common-law courts in the sixteenth century, by which adequate relief in the form of damages was given in these cases, led to the relinquishment by equity of that part of its jurisdiction, though specific performance of contracts where damages at law were inadequate was retained.³ Thus the modern law of contract, based on assumpsit, was initiated in equity, and the example which equity set and the strength of equity's competition led to the adoption at law of the enforcement of parol contracts. That this development took the form, in its initiation, of a fictitious action on the case for deceit must be regarded as the mere mechanics of the change.⁴ The impelling force that brought it about was this development of relief in equity preceding assumpsit by

nearly a century and continuing until *assumpsit* at law was definitely established.

Very similar to this development of *assumpsit* at law through like relief in equity was the development in the fifteenth century of equitable relief in cases of fraud and deceit, followed eventually at law by the action on the case. The ancient writ of deceit at law, up to the latter part of the fourteenth century, was limited to cases of fraudulent use of legal process.⁵ The writ of deceit on the case was allowed in 1367 against a defendant who sold cattle though he had no title,⁶ and similar cases followed during the reign of Henry VI, involving sales of bad food and of unsound articles warranted to be sound.⁷ These were really contract cases brought in the form of tort since, prior to *assumpsit*, no remedy at law existed in contract. They depended on deceit arising out of breach of the warranty, not on damages arising out of false representation of fact. No remedy existed at law for damages arising out of such false representation made with guilty knowledge until the development of the action on the case for deceit during the seventeenth and eighteenth centuries.⁸ Equity met the need of relief in these cases of deceit by allowing the recovery of property or money obtained by fraud, because of the entire lack of a remedy at law.⁹ The development of the legal remedy resulted in the abandonment of equitable relief in these cases just as in the corresponding cases of *parol* contracts.

Fraud as a defense to the enforcement of a contract developed at law contemporaneously with the development of *assumpsit*. Fraud by way of inducement could not be set up at law as a defense to specialty contracts because evidence of anything not contained within the sealed instrument was not allowed. Equity, therefore, intervened by restraining the fraudulent party from enforcing the specialty and by compelling him to surrender it for cancellation.¹⁰ With the development of *assumpsit*, rescission for

fraud became the rule at law where the contract was not under seal. Rescission in equity of specialty contracts preceded rescission at law just as the affirmative remedy for fraud and deceit in equity preceded the remedy at law. We may fairly conclude that equity led the way in both instances, bringing about the eventual development of the common law so as to establish the affirmative action on the case for deceit as well as the right to rescind simple contracts for fraud.¹¹

In the eighteenth century the development at law of implied *assumpsit* based on the fiction of a promise implied by law to prevent unjust enrichment, and including cases of contribution between cosureties and copartners, was in effect an extensive adoption at law of equitable relief. In the many cases of unjust enrichment in which equity implied a fictitious trust in order to do justice, the law implied a fictitious promise for the same purpose, accomplishing the same result, in effect, in legal form as that which had long been accomplished in equity by the use of the implied trust. Contribution between cosureties, copartners, and in other similar situations, based on the maxim that "equality is equity," was carried over into the law by the use of the same fictitious implied promise to make such contribution. In all these cases equity has not relinquished jurisdiction, which is concurrently legal and equitable.¹² Can there be any doubt that this development in the law was initiated in equity and established at common law by force of equity's example and competition?

Rights or choses in action in contract and for injuries to property were not assignable at law, in the earlier period, because of the notion that such assignment would violate a strictly personal relation between the original parties, the developing weakness of this notion being later reinforced by the laws against champerty and maintenance.¹³ But equity, in the fifteenth century, recog-

nizing that, by refusing to protect the rights of the assignee, the law failed to do justice, enforced such assignments, subject to all proper defenses, offsets, and counter-claims.²⁴ The incorporation of the law merchant into the common law in the seventeenth and eighteenth centuries established the principle of negotiability in cases of negotiable bills and notes.²⁵ The equitable doctrine recognizing and enforcing assignments of nonnegotiable rights of action was, in effect, carried into the law in the eighteenth and early nineteenth centuries by resort to the fiction that the assignee was the agent or attorney of the assignor, to collect and enforce the chose in the assignor's name, though the recovery was his absolutely. In substance, therefore, the assignee became the owner of the chose at law as well as in equity, though by the fiction above referred to it was treated as still the property of the assignor. This fiction has now been generally discarded, so that today the assignee may sue in his own name and enforce the chose exactly as he could in equity from the fifteenth century onward.²⁶ In this way the rule initiated by equity and enforced in equity since the fifteenth century was made a part of the law so that the right and interest of the assignee became concurrently legal and equitable. Here again equity initiated and, by force of example and competition, established an important reform in the law.

The lien theory of mortgages, established in New York principally by the decisions of Kent, first as judge and later as chancellor, and quite fully rounded out prior to 1835, was adopted by a large majority of the other states. In practical effect, in most respects this theory has been adopted piecemeal by most of the remaining states, which are generally classed as adhering to the common law or title theory. The history of this development is too extensive for elaboration here.²⁷ In equity the mortgagor was treated, from the early part of the seventeenth century, as the real owner of the mortgaged property, the mortgagee holding the

technical legal title as security for the mortgage debt. At law the mortgagee was sole owner, the mortgagor retaining possession subject to the mortgagee's right to take or recover possession as owner at any time unless a provision to the contrary had been made between the parties, and the mortgagee having that right in any event after default by the mortgagor.¹⁸ The one important failure of equity to make good and to protect the mortgagor as owner was in not preventing the mortgagee from taking or recovering possession from the mortgagor. However, if the mortgagee exercised this right at law he was charged in equity as trustee for the rents and profits and other benefits derived by him from his possession, establishing that his right of possession was not beneficial except for the purpose of protecting his security.¹⁹

As a practical matter, for most purposes, therefore, the mortgagor was owner under law and equity combined, since in cases of conflict between law and equity the equity rule prevailed. Equity controlled the mortgage relation for all purposes except where the question of possession was involved as explained above. The lien theory was simply the adoption at law of the equitable theory of mortgages. The pretense at law involved in treating the mortgagor as a tenant at will, or possibly a tenant at sufferance, when under the prevailing law as applied by equity he was actually the owner in possession of his own property, was too fantastic and unreal for continued acceptance by the jurists of New York and most of the other states. By adopting at law the position long taken and enforced in equity as the prevailing law, that the mortgagor is owner and the mortgagee owns the debt as personal property with a lien on the mortgaged property as security, the common law of mortgages prevailing in New York and most of the other states assumed its modern form, a result accomplished by the changes introduced by equity in the seventeenth century, and by the taking over by equity of a practical control

over the mortgage relation, making the opposing theory of the common law a fantastic failure to recognize accomplished facts.²⁰

Another instance of important reforms initiated by equity and subsequently accepted at law prior to 1835 was the enforcement of written contracts that had been lost or destroyed, on proof of such loss or destruction and on the establishment of their contents by secondary evidence. The technical necessity of proof of the original barred its enforcement in such cases under the early law. Equity corrected the situation because the law failed to do justice, and eventually the common-law courts adopted equity's rule.²¹ Equitable defenses to specialties were not made good in law actions until modern statutes provided therefor, which will be discussed hereafter.²² But in 1767 the defense of illegality to a specialty was held to be good at law, another instance of a reform at law accomplished by the action of equity.²³

ORIGIN AND GROWTH OF EQUITY IN THE UNITED STATES PRIOR TO 1835

What were the position and development of equity in the United States in 1835? That was the year in which Story's *Commentaries on Equity Jurisprudence* was published, and it marks what may fairly be regarded as the beginning of the most important period in the growth of equity in this country.

During the Colonial period the colonies of New England and New Jersey definitely refused to recognize or to adopt the English common law, except such specific parts of it as were adopted by statute or by decisions of the courts. It was repudiated as a subsidiary law, and all cases not covered by statute or prior decisions were disposed of by the layman courts of the period in accordance with their sense of natural justice and right. The law of God was expressly made the subsidiary law in Massachusetts under the early statutes.²⁴ In New York the common law was

more completely adopted as the law than in the other Colonies. In Maryland, Virginia, and the Carolinas early colonial statutes formally adopted the English common law as their subsidiary law. But the judges were laymen who knew little of the common law, and there were few lawyers with any knowledge or training—in fact, legislation of varying stringency, against lawyers and professional practice of the law, was common in most of the Colonies. There were few lawbooks through which knowledge of the common law could be gained. Under these conditions it is clear that the law of these colonies was much the same as the layman's law in New England and New Jersey.²⁵ Nevertheless, the codes and statutes, enacted in considerable fullness in most of the Colonies, particularly in Pennsylvania, were based on English law, and legal forms and terms, as well as legal practice, were derived from such knowledge of English practice as the colonists had. It is certain that they had no knowledge of any other legal system. During the years preceding the Revolution, professional lawyers became judges in many of the Colonies and the common law had been adopted piecemeal to a considerable extent.

This being the general situation of the common law in the Colonies, it is certain that there was no general adoption of the English equity system prior to the Revolution. The situation of equity in the New England colonies is illustrated by the administration of equity in Massachusetts. Equitable relief was given in a series of cases from 1654 to 1679 by the General Court of Massachusetts Bay Colony, which was the legislative branch of the government.²⁶ The expense, delay, and interference with the public business of the General Court caused by these private litigations led to the enactment of a law in 1685 which provided that the magistrates of the county court should act as a court of equity. This act recited that "wherein there is matter of apparent

equity, there hath been no way provided for relief against the rigor of the common law but by application to the General Court," showing definite recognition of the nature, purpose, and need of equity jurisdiction in the colony.²⁷ Whether equitable relief was actually given under this statute after 1686, when the Court of Assistants had its final session, appeals to that court in equity cases having been provided for in the Act of 1685, is a doubtful matter.²⁸ The revocation of the colony's charter in 1684 and the arrival of the new charter in 1692, providing for the government of the province as a dependent state, ended this attempt to establish a court of equity.²⁹ Thereafter, acts of the General Court in 1692 and 1693 establishing a court of equity were disapproved by the king in council as beyond the powers of the General Court, that power existing exclusively in the royal prerogative. But the act of 1692 and subsequent acts gave to the law courts of the province power to chancery penal bonds to the just debt and damages, to grant conditional judgments in suits to enforce mortgages, and to decree redemption of mortgaged property on tender or payment within three years after entry to foreclose.³⁰ No further attempt to establish a court of equity in Massachusetts was made during the Colonial period, and such equitable relief as was given, beyond the three classes of cases above referred to, was secured from the General Court in the form of orders and resolutions. It is probable that the judges of the superior court, all laymen during this period, unconsciously administered a rude sort of equity as part of the layman type of justice dispensed by them, in addition to the equitable relief in bond and mortgage cases which they were expressly empowered to give.³¹

In New Hampshire the royal governor and his council gave equitable relief, and, by act of 1692 providing for courts of judicature, it was enacted that the governor and council should con-

stitute the High Court of Chancery of the province. The governor and council acted as the court of appeals until the Revolution and, no doubt, continued to exercise the powers of a court of equity.³² In Rhode Island equity was administered by the colonial assembly, as in Massachusetts. By act of 1741 a court of equity of five judges, which was also to act as a court of appeals, was set up, but three years later this act was repealed as "inconvenient and a great grievance to the inhabitants of this colony."³³

In the New Haven Colony the freemen met in a large barn in 1639 and "it was agreed, concluded, and settled, as a fundamental law not to be disputed or questioned hereafter that the judicial laws of God as they were delivered by Moses and expounded in other parts of Scripture . . . shall be accounted of moral and binding equity and force, and as God shall help, shall be a constant direction for all proceedings here, and a general rule in all courts of justice how to judge betwixt party and party, and how to punish offenders. . . ."³⁴ Laws enacted thereafter were more definite in their terms, the texts of Scripture on which they were based being added to each law, were codified in 1650, and remained the law of the colony until 1686, known today as the "Blue Laws" of Connecticut.³⁵ In 1660 a charter for Connecticut was obtained by another colony, which included New Haven and which, in 1664, was, against its will, absorbed under this charter, in the Connecticut Colony. It is clear that only layman's equity could have been administered prior to that date. In 1686 a law was enacted creating a court of chancery "to be holden by the Governor, or such person as he shall appoint to be Chancellor, assisted by five or more of the Council."³⁶ This was, in effect, a court of the governor and his council, as in New Hampshire and New York. How far such a court actually operated is conjectural, since, in 1724, the general assembly appointed and empowered eight men "to hear and determine all matters of error and

equity that shall be brought by petition to the present General Assembly, and to cause their judgments to be executed effectually. . . .³⁷

In New York the royal governor, assisted by the council, acted as a court of equity intermittently from about 1685 to 1712.³⁸ That the exercise of the functions of this court was exceedingly fragmentary and intermittent is made clear by letters from the royal governors to the Lords of Trade in 1700, 1701, 1711, and 1712, in which they set forth the great need of a court of chancery and sought authority to establish such a court, which was duly granted them.³⁹ In 1712 Governor Hunter formally announced the opening of this court, and the house of representatives by resolution denounced it as contrary to law because it was established without their consent.⁴⁰ The governor claimed the exclusive right to act as chancellor because of his custody of the seal. Abuses in many forms existed in this court, including grossly excessive fees and undue delay in disposing of cases.⁴¹ It continued, however, down to the end of the Colonial period, doing little business and that of a sort which must have had little relation to the English equity system since administered by laymen, and subject to repeated attacks of the colonial assembly as contrary to law and dangerous "to the liberties and properties of the people."⁴²

The experience of Pennsylvania during the Colonial period may be summed up in two statements: (1) Acts of the general assembly, giving the county courts jurisdiction in equity in 1684 and 1690, and similar acts in 1701 and 1710 giving equity powers to the courts of common pleas, were repealed by the English government. A similar attempt in 1715 to establish a "supreme or provincial court of law and equity" met a like fate. (2) In 1720 a separate court of equity, which continued for sixteen years without interference from England, was established with

the governor as chancellor, but this royal governor's court was opposed by the colonists as was the similar court in New York and for the same reasons: fear of the king and his representative, the governor, and of a usurpation of their rights and liberties. It was abolished by the assembly in 1736.⁴³ This ended anything like equitable relief in Pennsylvania prior to the adoption of the state constitution of 1776, except the layman's equity afforded by the law courts as part of the layman's law which they administered.

In Delaware and Maryland these fears of the king and his governor did not exist, as in the northern colonies, since the Puritan element was lacking. The governor, usually with the aid of his council, or his appointee, acting as a court, administered such equity as their very imperfect knowledge of the English system made possible.⁴⁴ In Virginia the county courts were given general jurisdiction in law and equity in 1647. That an extensive jurisdiction in equity cases existed in this court during the later Colonial period is indicated by a law enacted in 1745, fixing the first five days of every session for equity cases.⁴⁵ In the Carolinas, after they became royal provinces in 1731, the governor and council acted as a court of equity, as did the governor in Georgia when that colony was surrendered to the Crown in 1752. There can be no doubt that the equity administered by the governors of these colonies was of the informal layman type with no close relationship to the equity system of the English chancellors.⁴⁶

It seems clear, therefore, that no real start was made during the Colonial period in the development of courts of equity or of equitable jurisdiction. Such as it was, whether administered by the governor and his council or by the courts, it was layman's equity applied by men without professional training as lawyers. In the northern colonies it was intensely unpopular, since it was regarded as the usurpation of popular rights and liberties by the

governors as tools of the king. Though this attitude was absent in the southern colonies, the informal layman character of law and equity administered there, especially in the Carolinas and Georgia, prevented any real establishment of the English chancery system.⁴⁷

The establishment of independence resulted in the setting up of courts of equity in most of the states. In New York the colonial court of the governor and council referred to above was recognized under the constitution of 1777, and in 1788 the New York Court of Chancery, in substantially the form in which it existed until merger under the code in 1848, was established in an important convention presided over by Governor Clinton, in which Livingston, Hamilton, and Jay were the leading actors.⁴⁸ Some of the new states, including New Jersey and Delaware, established separate courts of equity, as did New York. Others gave separate and distinct equity jurisdiction to their courts of law. It is enough at this point to understand that equity courts were set up in one form or another in all the original states except Massachusetts and Pennsylvania, and that the new states, as they were admitted thereafter, except Maine, established courts of equity in some form.⁴⁹ In Massachusetts the original fear of chancery courts administered by royal governors and the distrust of a law coming so directly from the king, which together with the Crown's denial of the authority of the colonial assembly to establish such courts had prevented the establishment of courts of equity in the colony, resulted in such a marked prejudice against equity in the popular mind, based on ignorance of its nature and purpose, that every effort to establish a general equity jurisdiction in the courts of that state failed, and litigants were left without remedy in cases of dishonest trustees, fraud, accident, mistake, specific performance, injunction against torts, and the many other situations in which relief at law was nonexistent or

inadequate. Relief in bond and mortgage cases provided for under the colonial laws⁵⁰ was continued, and in some other instances relief of an equitable nature was grudgingly provided for by special statute, and these were applied narrowly by the courts. It was not until 1855 that equitable relief in fraud cases was provided for, and not until 1856 that such relief could be had in cases of accident and mistake. In 1857 "full equity jurisdiction according to the usages and practice of courts of chancery" was given to the supreme judicial court. This was narrowly construed by the courts as applying only to cases in which the remedy at law at that date was not adequate, including the remedy of self-help. Full equity jurisdiction was not conferred upon the court until 1877.⁵¹

Developments in Pennsylvania are exceedingly interesting as a kind of forerunner of the merger of law and equity, which has been accomplished under codes of procedure in a large majority of the states. The early colonial codes enacted in Pennsylvania under the authority of the charter from Charles II to Penn contained many important reforms of the common-law system, especially of pleading and practice, providing for simple pleadings and trials and for the merger of law and equity in the same courts.⁵² The difficulty seems to have been that these laws did not provide for specific relief by contempt process, and, therefore, equitable relief in many instances could not effectively be given. We have seen how efforts to establish a court of equity in the later period of the colony failed.⁵³ Nevertheless, so far as equitable relief could be given without resort to the contempt process the regular courts granted and enforced it. Failure of consideration, payment, mistake, and other equitable defenses were freely allowed in actions at law.⁵⁴ Fifteen years later a *cestui que trust* was allowed to maintain ejectment in his own name, the court saying that otherwise "he would be without remedy in the case of

an obstinate trustee.⁵⁵ The practice of charging the jury as to the equities is illustrated in a case decided in 1785.⁵⁶ The equity thus submitted to juries in the Colonial period was of the usual layman type, but after the Revolution, as legal knowledge on the part of judges and lawyers became more usual, efforts were made to get away from a system of equity that changed with every jury. The judges became familiar with the doctrines of English equity, and the process of charging equities to juries became, as it no doubt always was in theory, the administering of equity by the judge assisted by the jury as triers of fact—precisely the situation in code states where equitable issues arise in jury cases.⁵⁷ The equitable rule permitting proof of the contents of lost or destroyed instruments by secondary evidence, adopted at law in England two years before, as we have seen,⁵⁸ was adopted without reference to the English case in 1791.⁵⁹ Replevin, like ejectment, was made to serve equitable as well as legal interests, and equitable interests in land were made subject to judgment liens. Statutes provided for foreclosure of mortgages.⁶⁰ They failed to go the full way in merging equity by adopting specific enforcement of rights *in personam* by the contempt process, and wherever injunctions against threatened torts, specific performance of contracts, or discovery were needed no effective relief could be had because no effective means of enforcement existed. The assessment of heavy damages to be released on performance by the defendant, used in some cases,⁶¹ was quite obviously not an effective substitute for specific enforcement *in personam*. By a series of laws from 1836 onward, equity powers covering the whole field of equitable jurisdiction were gradually given to the courts—at first more extensively to the Philadelphia courts, until in 1857 this was made uniform throughout the state.⁶²

No extensive progress was made in the growth of equity in the original states after the Revolution down to 1810. It was a period

in which the new jurisdiction was being established. The developments in Massachusetts and in Pennsylvania make clear how slow this progress was.⁶³ Ignorance of the English equity system was the rule, and the process of educating lawyers generally in this field is still very far from satisfactory; and ignorance of the true nature of equity in its relation to the law is still altogether too prevalent even among judges and professors of law. No considerable development from the layman's equity of the time of the Revolution could be expected until great leaders should appear to educate the bar and direct the way of progress. Kent and Story began their great work in this development about 1810. Dean Pound has summed up the position of equity in this period very effectively:

"The real history of equity in this country begins after the Revolution. One might almost say it begins in the second decade of the nineteenth century. For James Kent became Chancellor of New York in 1814, and Joseph Story became a Justice of the Supreme Court of the United States and began to sit in equity causes in the federal Circuit Court in 1811. In England the 'crystalizing' of equity was not yet quite complete. Eldon had still more than a dozen years to sit when Kent became Chancellor. But if equity was still developing, the 'fusion' of law and equity was going forward even more rapidly. At the adoption of the Constitution only five of the thirteen states had courts of equity. In the other eight, such chancery jurisdiction as existed was in the hands of courts of law or of legislative assemblies. The federal Judiciary Act (1789) committed law and equity jurisdiction to the same tribunal, and that tribunal was set up in the image of a court of law."⁶⁴

Kent's *Commentaries on American Law*, published in 1826-1830, and Story's *Commentaries on Equity Jurisprudence*, published in 1836, give us the measure of equity's growth in this country at the time the study of law was initiated in the School of

Law of New York University one hundred years ago. Much of this growth was the direct result of the scholarship and ability of Kent and Story, shown in their accomplishments on the bench.⁶⁵ No summary in detail of the jurisdiction of equity as of 1835 is possible or desirable at this point in this paper. Those details, so far as they are pertinent to our topic, will appear in the discussion of the growth of equity during the century that followed and of the contribution of that growth to the entire fabric of the law, which is the subject matter of the balance of this article.

THE CONTRIBUTION OF EQUITY TO
AMERICAN LAW SINCE 1835

The Merger of Law and Equity

The reasons for the development of equity in the chancellor's court as a separate system outside the common law, with a different court and a distinct system of pleading and practice, were entirely historical and need not be discussed here.⁶⁶ The existence of two systems of law, differing radically in substance and in many respects in competition with each other in the same sovereign state, each operating as the law of that state, was an anomaly entirely without reason other than the historical facts that brought it about. Of course, in no exact sense could it be said that, in the many cases of conflict between the two systems, both conflicting rules were, in any instance, law. The final word rested with the chancellor because of his power by *in personam* procedure to restrain parties from proceeding at law and to compel restitution of what had been recovered at law contrary to the rules of equity, and therefore the rule in equity was the true law in such cases and the opposing legal rule was spurious or pretended law.⁶⁷

Nevertheless, prior to code merger of law and equity in 1848

and thereafter, this anomaly continued unabated. A defendant at law having a valid equitable defense or counter-claim in equity was compelled to bring a separate action in equity in order to establish his defense or counter-claim, which could be enforced against the law plaintiff only by the contempt process. A party mistaking his remedy and suing in the wrong court was compelled to bring a new action. Two actions in the same matter were necessary when both legal and equitable relief was needed. The greatest contribution to Anglo-American law arising from the development of equity in the last century was the merger of equity with the law as a single unified system, first established in New York in 1848 and later in twenty-nine other states and territories, and established in England by the Judicature Acts of 1873.⁶⁸ This merger did not change any substantive rule of equity nor did it change any rules of the common law except those which were in conflict with opposing equitable rules and which were in reality spurious or pretended law. Legal rules of that kind were eliminated by code merger, which simply brought law and equity together as a single coördinated system, ending the scandal of competing rules and the practical absurdity and loss involved in the necessity of maintaining an action in equity in order to establish an equitable defense, and of bringing two actions where, in the one controversy, both legal and equitable relief is required.

Only six states remain with separate courts of equity.⁶⁹ In fourteen states and in the federal courts equity is administered as a separate system by the same court that administers the law.⁷⁰ But even in these jurisdictions law and equity have been merged to a very considerable degree by statutes providing for the pleading and trial of equitable defenses in law actions, and other statutes providing for the transfer to the proper court of actions brought by mistake at law or in equity.⁷¹ There remains, however, the

class of cases in which both legal and equitable relief is required and in which two actions still are necessary, as are all the expense, duplication of effort, and confusion arising out of maintaining equity as a separate system whether with or without a separate court. The movement now in progress, approved and directed by the Supreme Court of the United States, merging law and equity in the federal courts, should bring about a complete merger in the states last referred to, which have combined law and equity piecemeal in the imperfect form of the special statutes applying to equitable defenses and to transfer of actions, discussed above.⁷²

This progressive step in legal development was taken despite the strong opposition of a conservative bench and bar. There has been a very considerable failure on the part of some judges to grasp the real nature of the merging of law and equity. They assert with emphasis that the nature of equitable relief is radically different from that of relief at law and that it is impossible to abolish this distinction by legislation, and that merger means destruction of one of the two forms of relief, with its attendant procedure and form of trial.⁷³ Code merger means nothing of the kind. It involves no change in substantive equity and no change in the law except the elimination of spurious rules of law which are in conflict with and therefore nullified by prevailing rules in equity. It merely brings law and equity together in a single system involving the recovery of damages in law cases as before and the granting of specific relief in equity cases, administered by a single court with legal and equitable powers, dispensing complete relief, legal and equitable, as may be required, in every controversy, without the wasteful, troublesome, and unreasonable practice of resorting to another court in another action in order finally to settle the dispute.

That equitable rights continue to be equitable though merged

with legal rights administered by a single court of both law and equity under the code is illustrated by the adoption at law of equitable doctrines prior to the code. These have been discussed in some detail above.⁷⁴ Taking as an illustration the assignment of choses in action, void at law but enforced in equity from the fifteenth century onward, when the law gave effect to such assignments in the eighteenth century under the fiction of a power of attorney in the assignee to sue in the assignor's name, the assignee's right to enforce the chose remained exactly as it had been in equity, subject to defenses, offsets, and counter-claims whether or not the assignee was a purchaser for value without notice.⁷⁵ Equitable defenses to specialties including fraud, mistake, payment, accord and satisfaction, and others are not made legal defenses, because under the code or special statutes they may be set up in an action at law on the instrument under seal. They are still equitable defenses triable to the court, without any change in substance though made available in the law action, and they are applied and enforced on equitable principles.⁷⁶ The confusion arising from the failure to apprehend the simple operation of code merger as bringing substantive law and equity together is well illustrated in the position taken by some courts and legal authors who insist that they necessarily become legal defenses if made available in law cases.⁷⁷ By the great weight of authority such defenses are enforced in so-called law actions with the same force and effect as though they had been established by affirmative action in equity.⁷⁸ Law and equity are brought together in the same court and the same action, which in code states are concurrently legal and equitable.

The merger of law and equity under the code is, in fact, a very simple matter. The confusion that has existed with reference to it is always directly attributable to misapprehension of what it means, usually based on the mistaken notion that it involves

changing "equity" into "law." The progress of education in equity has apparently removed this misconception to a great extent, as we hear little of this kind of statement from reputable sources in these days. Nevertheless, there is still a considerable amount of misapprehension of this kind among judges and law teachers. It is exceedingly important that this be removed, and that the usual prejudice against any important change be overcome in this instance by a real understanding of the nature of the reform accomplished by code merger and of the importance of it to orderly and effective administration of the law. We have seen how it works in cases of equitable defenses. Its nature and purpose are even more strikingly shown in cases involving both legal and equitable relief in the same action, or in the alternative, depending on the facts established at the trial.

Courts of equity have always recognized and applied the law—in fact the greater part of equity's jurisdiction consists in enforcing legal rights by equitable remedies. It is now the prevailing rule in equity that damages will be given if the plaintiff establishes his right to equitable relief, in order that complete relief may be received without another action at law,⁷⁹ but in non-code states equity refuses to give damages where the plaintiff fails to establish any right to relief in equity.⁸⁰ In such states, of course, a separate suit in equity is necessary when, in an action at law, equitable relief in addition to damages are needed. Under code merger every action is always both at law and in equity so that complete relief, legal and equitable, will be given, or damages alone or equitable relief alone in the alternative will be given as the facts established on the trial may require, even though neither party has asked for it originally or by amendment of his pleadings.⁸¹ In fact, failure to secure equitable relief in an action in which it could and should have been granted bars the plaintiff from a new action therefor when his action for legal relief fails.

Therefore, not only is he permitted to secure such relief in the law action, but he is required to do so on penalty of forfeiting such relief, since he has had his day in court in an action which was both legal and equitable in that he could have either or both forms of relief to which he was entitled under the pleadings. The leading case establishing this rule is probably the best case with which to illustrate exactly what code merger means.⁸² In that case ejectment failed because the sheriff found it impracticable to enforce the judgment by removing an encroaching wall. The plaintiff might have had a decree ordering the defendant to remove the wall, but he failed to ask for that relief in valid form, permitting the action to die by expiration of the time to appeal. He lost his later action brought "in equity" for a mandatory injunction to compel removal of the wall because his first action was in equity as well as at law, as every action is. It was for the purpose of securing either or both forms of relief; therefore, he had had his day in court.

An unfortunate dictum in a court of appeals case,⁸³ followed literally by the appellate division in a later case,⁸⁴ has created some doubt whether code merger really exists in New York. The early misapprehensions discussed above seem to have returned, in some measure, to plague bench and bar. In the *Jackson* case the complaint was drawn on the theory of an action for an accounting by the defendant as joint venturer. The answer denied the joint venture and set up a contract to pay plaintiff the reasonable value of his services. Judgment for the plaintiff for the value of his services on the defendant's theory was reversed by the Court of Appeals as improper because the complaint had not been amended and the answer did not cure the defect. The case turned on this narrow point of pleading, but the court said: "Where . . . it appears that there never was any substantial cause for equitable interference, the court will not retain the ac-

tion and grant purely legal relief, but will dismiss the complaint. . . ."

"The inherent and fundamental difference between actions at law and suits in equity cannot be ignored." It might be noted that the court did *not* dismiss the complaint but ordered a new trial, and no doubt the plaintiff amended his complaint and proceeded accordingly on the new trial in entire accord with code merger. This dictum had no actual result on the disposition of the case and was entirely uncalled for under the facts. It led to the decision by the appellate division in the *Poth* case in which this dictum was accepted and applied as law, the court reversing a judgment for damages in an action for specific performance where it was found that specific performance could not be given and the complaint had been amended accordingly. A few other cases with a like tendency followed this dictum,⁸⁵ but the error has spent itself and code merger in New York as recognized and applied in the earlier cases must be regarded as finally established.⁸⁶ The fundamentally wicked state of the old law, which denied a party relief to which he was clearly entitled under the facts as pleaded and proved merely because he had mistaken the remedy in his prayer for relief, is definitely at an end, as is the travesty of suits in equity to bar actions at law and the bringing of two actions in the same controversy in order to get complete relief.

It is often said that the preservation of the right to jury trial by constitutional provision really prevents code merger, because separate trials at law are necessarily continued in jury cases.⁸⁷ This is the same kind of misapprehension of code merger in another form. Though trial terms are necessary in jury cases and the traditional legal actions must be tried by jury unless such trial is waived, that does not prevent the action and the court from being also an equitable action in a court of equity if equitable relief is required under the facts either in addition to or in-

stead of legal relief. The ejectment cases in which the court may give a mandatory injunction where execution of the judgment in ejectment by the sheriff is impracticable quite sufficiently illustrate this.⁸⁸ The judge in a jury case at law is a judge in equity bound to give such equitable relief as the facts in the case may require.

Some confusion has arisen in law cases in which equitable defenses have been pleaded. In New York there has grown up the practice of submitting to the jury, as part of the entire controversy, disputed questions of fact involved in equitable defenses, such as fraud or mistake. There is no objection to this practice if it is done with the understanding that the responsibility rests with the trial judge, and that his submission to the jury of disputed questions of fact involved in these defenses is entirely at his discretion, and that he may disregard its verdict and decide to the contrary. Certainly no change is made in the form of trial by making the defense available in the jury action. It is still an equitable issue to be disposed of according to the principles of equity, and the form of trial continues unchanged, exactly as do the substantive doctrines involved.⁸⁹ This is all in entire accord with code merger. Law issues are tried to the jury and equity issues are tried to the court without change, but they are combined in the same trial, saving the expense and delay of separate trials and eliminating the old conflict between the two jurisdictions. In a few states statutes relating to jury trial have been narrowly construed as requiring the equitable defense to be submitted to the jury with the other issues generally unless pleaded as a counter-claim.⁹⁰ These are quite obvious cases of the survival of the old confusion and lack of understanding of code merger. The forms of trial are brought together, just as the substantive principles of the two systems are, without substantial change in either except as above noted.⁹¹

Code merger is an accomplished fact in by far the greater part of this country. In the noncode states statutes permitting equitable defenses in law actions and providing for the ready transfer of actions from law courts to equity courts and the reverse when started in the wrong court have accomplished, in effect, a very considerable part of the complete merger under the codes. The federal courts will soon adopt a complete merger, which will actually involve no great change in substance from the present situation in those courts, though it will greatly simplify and rationalize federal procedure.⁹²

The outstanding importance of code merger of law and equity lies partly in the fact that reforms in our legal system arising in equity out of the application of equitable principles in an ever widening stream no longer have to be "adopted" at law as did the reforms initiated and established in equity prior to code merger, discussed in the first subdivision of this paper. They become at once an established part of our legal system, administered by a single court of both law and equity. The more important of these developments during the last hundred years will now be considered.

Development of Equitable Relief in Tort Cases

A fair estimate of the development that equitable relief had attained in 1835 may be had from Story's treatise. Relief against torts in equity is treated in his chapter on injunctions. A considerable part of that chapter is devoted to injunctions restraining parties from maintaining actions at law.⁹³ Merger of law and equity in code states eliminates, as we have seen, any occasion for such injunctions by way of separate actions. Code merger makes the rule in equity supreme wherever a conflict arises with rules of law, and, since under the code every action is determined by a court that is at the same time a court of law and of equity, final

relief on equitable principles will be given in a single action, eliminating altogether the need of an action in equity to restrain an action at law in order that equity may dispose of the controversy at law. Separate suits in equity for temporary injunctions pending an action at law are eliminated for the same reason. The court in which the common-law action is brought may, on motion therefor, grant any such injunction, acting as a court of equity where formerly it could be secured only by a separate action in equity. In the noncode states, however, most of the law that Story discusses lives on except as it has been modified by statutes providing for equitable defenses in law actions, discussed in the preceding subdivision of this paper.

In discussing injunctions restraining waste, Story says: "The remedy by bill in equity is so much more easy, expeditious and complete, that it is almost invariably resorted to."⁹⁴ The almost complete substitution of the action in equity for an injunction and damages for the action on the case at law, now generally recognized,⁹⁵ was apparently an accomplished development a century ago. The liberalizing effect of equity's action on the law generally, as well as the power of equity to change the law, is clearly illustrated in cases of equitable waste. The narrow limitations of this action at law resulted in an entire absence of remedy in many situations demanding relief, and this relief was given in equity not only in the form of injunction but also of damages.⁹⁶ The most important development of the law of waste since 1835 has been the combining of legal and equitable waste as the result of code merger. Under the merged system relief by way of injunction or damages or both will now be freely given in all cases of legal and equitable waste, eliminating the old rules at law which denied relief in conflict with the rules in equity applying to the different cases of equitable waste.⁹⁷

The general principles of equitable relief by injunction against

trespasses had been established by 1835,⁹⁸ probably more completely in the United States than in England.⁹⁹ The emphasis in the earlier cases was on trespasses causing irreparable damage in the nature of waste. Later decisions established the principle, clearly expressed by Story but not so clearly established by the earlier cases, that the prevention of a multiplicity of suits at law by a single suit in equity in cases of continuous or repeated trespasses was the more important purpose of equitable intervention.¹⁰⁰

Code merger necessarily eliminated the old rule that in trespass cases in equity a disputed question of title had to be determined by an action at law before equity would take jurisdiction except to grant a temporary injunction in a proper case, pending the termination of the legal action.¹⁰¹ The same court is always a court of law and equity and must try and determine all issues, legal and equitable, arising between the parties under their pleadings. To require two actions in such cases was exactly the sort of waste and duplication of effort that code merger was designed to end. Special statutes in the noncode states do not correct this situation, and we still see in such states the old absurdity of denying needed relief in equity because the title is in dispute, in solemn disregard of reason and common sense and though courts of equity are constantly determining legal issues of law and fact in all sorts of other controversies, as, for example, in cases of specific performance.¹⁰² The rule established in cases decided by Lord Eldon,¹⁰³ followed by Chancellor Kent in 1818,¹⁰⁴ that the existence of a nuisance must be established at law before equity will intervene in cases of unreasonable interference with a neighbor's right of enjoyment of his property, was quite clearly the result of confusion with nuisance cases involving the violation of easements in which the existence or extent of the easement was in dispute, as pointed out by Professor Lewis.¹⁰⁵ Very little is left

of this mistaken rule. Even in cases of disputed title to easements the rule could not exist under code merger for the same reasons that make impossible a like rule in trespass cases.¹⁰⁶ In noncode states the later cases generally ignore it or find that trial by jury is not required because interpretation of documents by the court will settle the issue, or because such trial has been waived.¹⁰⁷ The practical elimination of this rule, and the great advantage of the action in equity, which settles the entire controversy in a single action by enjoining the nuisance and awarding prior damages, over a succession of actions at law for damages, has resulted in the virtual disappearance of the action at law, very much as the remedy in equity for waste has supplanted the remedy at law.¹⁰⁸ The contribution of equity to the law's growth in all these cases is self-evident. The extensive development of the modern law of nuisance, in the protection both of easements and of rights of enjoyment between neighboring property owners where no easement exists, has been under the control of equity guided by equitable principles.

The growth of equitable protection of public rights in the past century is an outstanding section of law developed by equity. Injunctions against public nuisances, arising usually in the form of purprestures interfering with the use of public ways, navigable waters, parks, and other public places, were exceedingly few in number prior to the nineteenth century.¹⁰⁹ They were based ostensibly on protection of property rights of the state, although such ownership as a *jus privatum* in those cases has no actual significance, the real purpose being the protection of the rights of enjoyment of the public in the use of public ways, waters, parks, and the like. A few early cases, where no question of public property was involved, enjoined nuisances because they were dangerous to the public,¹¹⁰ and under modern cases there is no doubt that public nuisances which are dangerous to the health of the com-

munity will be restrained, though no question of the enjoyment of property, public or private, is raised.¹²²

It was a short step from cases involving protection of the public health to those covering protection of public morals by injunction in equity.¹²³ It is clear that protection of the public from nuisances that endangered its health and morals was quite as necessary as protection of the public in its enjoyment of public ways, waters, and other public property. In these cases prevention by injunction is so superior to punishment under the criminal law after the harm to the public has been done as to make self-evident the inadequacy of the remedy at law. Here as in all other cases there is no interference with or attempt to enforce the criminal law. If the act enjoined is committed, punishment for the contempt in no way interferes with the conviction and punishment of the offender for the crime.¹²³ The latent power of equity to shape and develop new law on a higher plane of reason and conscience and with an increased effectiveness to meet human needs has no better expression than in these cases.

The most significant and important development of the law of torts during the last hundred years has been in the recognition and protection of business rights and interests. Wrongs of this kind interfere directly with a man's right to make a living, and it is obvious that the recovery of damages by successive actions at law is entirely inadequate. Such damages are in no sense an effective substitute for the right to make a living in any lawful occupation. Therefore, this development of the law has been almost exclusively in equity, the relief granted including an injunction restraining the wrong and the awarding of damages sustained up to the granting of the decree.¹²⁴

Wrongs of this kind take either of two forms: unfair competition or malicious injury to another's business, malicious because not justified by fair competition or other lawful purpose. A be-

ginning in this law was made in England in the latter part of the eighteenth century in a case involving the protection of a trade-mark.¹¹⁵ One of the earliest cases of this kind in the United States was decided in 1844.¹¹⁶ That the law of unfair competition and the protection of business rights has developed from these small beginnings into one of the most extensive and important divisions of the law is a truism requiring no elaboration. Most of this development has taken place in the last fifty years, and much that is most significant has been relatively recent. That trade-marks and trade names are not property in themselves and are of value only as incidents of the business with which they are associated, and that the tort involved in their wrongful use is the stealing of that business by unfair competition is law established by a great number of modern cases.¹¹⁷ Injury to business by unfair disclosure or use of business secrets does not depend on protection of such secrets as property. Except where a monopoly has been secured by patent, ideas, whether in the form of inventions, formulas, lists of customers, price lists, or other trade secrets, are free to all who may acquire them from the inventor or author by fair means. Whether or not their use by a competitor will be restrained is simply a question of unfair competition. Though this law traces back to earlier English cases cited by Story,¹¹⁸ its elaboration and development have been the result of comparatively recent decisions.¹¹⁹

Direct injury to trade or business not involving trade secrets or trade-marks will be restrained and damages awarded unless justified or privileged as fair competition or fairly done in furtherance of the actors' interests. This doctrine was applied by Lord Holt as early as 1707,¹²⁰ but its development and elaboration have been very largely the result of modern cases. Whether competition is unfair or not is determined by applying the test of the average man to the circumstances of each case; liberty of action

in competition will not be restrained unless it violates a fair balance of the rights of each competitor to do business with the greatest freedom consistent with a similar right in the others. Just as the fullest enjoyment of real property as between neighbors involves restraint on each so that neither will be permitted unreasonably to interfere with the rights of enjoyment of the other, so each business competitor must be limited to competition that is reasonable and fair in order that each may have the fullest possible freedom in his trade or business without the danger of its destruction by unfair practices by the other.²²²

Where the defendant is not a competitor the injury to the plaintiff's business must be justifiable as due to fair and reasonable protection or furtherance of the defendant's rights. The statement that malicious injuries to the plaintiff's business in such cases are actionable at law and will be restrained in equity means no more than this. Any such material injury not justified by fair and reasonable protection of the defendant's rights and interests is "malicious" and, therefore, actionable under the cases.²²³

The development of the law regulating relations between capital and labor during the last forty or fifty years is probably the most striking illustration of growth of law accomplished by equity in modern times. Competition between an employer and his employees involves the well-established right of labor to organize and to strike or threaten to strike in order to secure better wages and conditions of labor, and the equally well-established right of the employer to hire and discharge employees as he pleases and to lay down the terms of employment. In this competition each must act within the limits of what is reasonable and fair. In determining what is reasonable and fair the test of the average man is used very much as it is applied between neighboring owners in determining whether either one has so used his property as to interfere unreasonably with the other's rights of

enjoyment.¹²³ This test of the average man must, necessarily, be applied for want of a better in many other situations, such as determining lack of reasonable care in negligence cases and intent to make a permanent annexation as shown by the facts in cases of fixtures. So long as each side acts within the limits of reasonable and fair competition as determined by this standard he commits no legal wrong no matter how serious the resulting damage may be to the other's right to carry on his business or to earn wages. The use of threats of violence, intimidation, or direct violence are illustrations of unfair competition by employees when used to induce men to quit their work or to prevent the employer from securing the labor necessary to the running of his business.¹²⁴ Inducing employees to break their contracts of employment that specify fixed terms is uniformly held to be unfair as it involves a tort for which the employer may recover damages.¹²⁵ Usually such employment is at will, and it is now settled law that inducing an employee at will to quit by peaceful persuasion without threats of violence does not involve a breach of contract and is therefore legal.¹²⁶

Whether inducing breach of contract may ever be regarded as reasonable is sharply raised in cases of the so-called "yellow-dog" contracts, *viz.*, contracts binding the men not to join a labor union during the term of their employment. In *Hitchman Coal Co. v. Mitchell*,¹²⁷ union representatives were restrained from soliciting and inducing men who had made such contracts to break the contracts by joining a union, though they were employed for no definite term. A leading New York case held that these contracts were void for lack of consideration as the employment of the men was at will, and denied the injunction.¹²⁸ The court said that "whatever rule we may finally adopt, there is as yet no precedent in this court for the conclusion that a union may not persuade its members or others to end contracts of employment where the

final intent . . . is to extend its influence." It seems clear that the only real purpose of these contracts is to prevent the unionizing of the shops involved by enjoining union officials from efforts to that end, taking advantage of the rule that the courts will restrain third persons from inducing breaches of contract—in effect, lining up the courts in advance against the unions in the struggle to extend collective bargaining throughout the particular industry involved. That equity should in the exercise of its discretion refuse to enforce such contracts would seem to be in entire accord with fundamental equitable principles.¹²⁹

Progress in the development of this law is shown with particular clearness in the cases sustaining the right of labor in a national industry to extend the unionizing of shops within the industry either by inducing the men in the shop to strike in order to prevent the employment of nonunion men, or by refusing to work on goods produced in such shops until unionized. The right to refuse to work with nonunion labor is the basis of the law permitting strikes to enforce the unionizing of shops in the same industry, and the similar right to refuse to work on materials produced in open shops is the basis of the cases that permit the boycotting of materials so produced.¹³⁰

Though the federal courts in several cases have held that strikes or boycotts may not be used to extend unionizing of the industry throughout the country,¹³¹ in a later case the United States Supreme Court refused to enjoin a union from efforts to unionize a shop within the same industry. Judge Taft, after asserting that the right of labor to combine and to strike is settled everywhere, said: "To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their

trade in the neighborhood."³³ Though this statement applied to a local union in a single community, it accepts as valid the reasons for the prevailing law in New York and other states permitting, by lawful strikes and boycotts of nonunion goods, the extension of the union in the industry generally. The dissenting opinions of Judge Holmes and Judge Brandeis in earlier cases³³ bid fair to become the established law of the federal courts, as they have of the state courts quite generally, with the exception of Massachusetts and possibly a very few other states. The effects of the Norris-La Guardia Act on this law have not as yet been definitely determined.

"Equity protects property rights" is a maxim responsible for the denial of equitable relief in many situations, involving personal injuries, where relief at law is clearly inadequate. Probably the most obvious case of the failure of equity to grant needed relief because of this doctrine is in the refusal of injunctions against threatened defamation of a serious kind. Damages arising from loss of reputation usually involve a serious loss of earning power and the loss of business rights of substance by the person affected, proximately resulting from the defamation, but even where that element is missing it should be clear that damages at law as a remedy are inadequate. It is speculative and uncertain, and no amount of money can compensate for the personal injury that defamation may cause. In England the Judicature Act of 1873, reenacting in effect provisions of the Common Law Procedure Act of 1854, conferred on the combined courts of law and equity power to grant, without limitation, injunctions against defamation in all personal actions of tort and contract. Under this statute it is settled law in England that a preliminary injunction against threatened defamation will be granted where the facts are so clear that a verdict in the defendant's favor would be set aside,³⁴ and that a permanent injunction will be granted after the defa-

mation has been determined to exist by verdict of a jury and by judgment thereon.¹³⁵

In the United States, statutes providing for preliminary injunctions in law actions are narrowly limited to actions such as ejectment, in which the defendant is threatening to do some act with respect to the subject matter in denial of the plaintiff's rights, which will tend to make the judgment ineffectual, or is threatening to remove or to dispose of his property with intent to defraud the plaintiff.¹³⁶ The American cases involving defamation follow the old rule generally without any reference to or discussion of these statutes.¹³⁷ However, where the libel causes direct injury to the plaintiff's business it will be enjoined, as in the case of false attacks, in bad faith, upon the validity of the plaintiff's patent.¹³⁸ Such libels are clear cases of unfair competition when published by a competitor, and of malicious injury to the plaintiff's business without justification when the defendant is not a competitor. In the labor cases the courts enjoin libels made for the purpose of destroying the employer's business as unfair competition, just as they enjoin violence.¹³⁹ The final step would be a short one to the position of the modern English cases, at least in the code states.

In noncode as well as code states important progress has been made in shaking off the incubus of the unreasonable doctrine that equity is limited to the protection of property rights. In many situations where relief at law would be clearly inadequate courts in several states have repudiated this doctrine and have held or declared that purely personal rights will be protected by specific preventive relief.¹⁴⁰ This is simply part of the forward movement by which specific relief, which enforces the rights of the parties exactly, is gradually displacing damages, which only roughly compensate for violations of such rights after the harm has been done.¹⁴¹ Sufficient progress has been made under the cases in noncode as well as code states to justify fully the final

casting away of the outworn maxim that equity protects only property rights.

Development of Specific Performance of Contracts

There can be no doubt that prior to 1835 the general principles and most of the details of the law of specific performance of contracts in equity had been developed in their modern form.¹⁴² The developments that have taken place in this law in the last hundred years have been, for the most part, the extension of specific relief, which enforces exactly the rights of the parties, at the expense of damages, which are at best a form of substitutional relief for violations of such rights after the harm has been done.¹⁴³ Coke's crude conception of a contract as an option to perform or to pay damages¹⁴⁴ has been generally repudiated, and breach of the contract is a wrong, as is a tort, involving a power, not an option, to commit the wrong.¹⁴⁵ Nevertheless, in practical effect either party, at law, has such an election since he may break his contract and pay damages. Equity, by enforcing specific performance where damages are an inadequate remedy, corrects the situation by imposing a higher ethical standard of conduct.

Contracts for the sale of personal property, where the chattels involved have unique qualities which make them difficult to purchase, and which make damages at law inadequate, have from an early day been enforced in the purchaser's favor. The Uniform Sales Act now in force in most states, following the English statute, provides that the court may, if it thinks fit, on the buyer's application, enforce specific performance in any such case, though the contract would not be so enforceable under the rule in equity.¹⁴⁶ The seller, however, under cases in New York and many other states, which gave him at his election the right to hold or store the goods for the buyer and to recover the full price, was given at law what amounted to specific performance.¹⁴⁷ Un-

der the Uniform Sales Act¹⁴⁸ this right is limited to goods that may not be resold at a reasonable price.¹⁴⁹ In this way a larger measure of specific performance than existed in equity prior to the statute, substantially the same whether the plaintiff be buyer or seller, has been brought about.

Contracts to arbitrate were held to be valid at law only because the courts held that they did not interfere with the right of either party to pursue his remedy in the courts. The remedy at law in case either party broke his contract by enforcing his rights in the courts was obviously worthless as he could prove no damages.¹⁵⁰ Equity recognized the inadequacy of damages as a remedy, but refused specific performance because of the supposed difficulty of compelling the defaulting party to appoint an arbitrator or of compelling such arbitrator to act if appointed. The courts refused substantial specific performance by appointing an arbitrator who would act in such cases where the defendant had refused to appoint an arbitrator, insisting on exact and literal compliance with the contract by action of the arbitrator selected by the party in default, specific performance of which they regarded as impracticable.¹⁵¹

The arbitration acts of New York and eleven other states and of the federal government¹⁵² expressly provide for specific performance of arbitration contracts. Failure to appoint an arbitrator as provided in the arbitration agreement, or the failure of an arbitrator to act is met by the appointment of an arbitrator by the court, with power to act as though appointed as provided in the contract. The difficulties conjured up by the courts, fanciful at best, were thus removed. These acts provide for a speedy determination of the issue whether specific performance will be enforced or not by providing for a petition on eight days' notice for a court order directing that the arbitration proceed as provided in the contract. If the making of the contract or its default is

denied, the issue so raised is tried to the court unless a jury trial is demanded, in which case the issue is sent to a jury term for trial. In either case, if the making of the contract and default therein are established, the court is required to make an order summarily requiring the parties to proceed with the arbitration.

To a very considerable degree the courts in some states had overcome the technical objections to specific performance in these cases by holding, in specific instances, that the method of arbitration provided in the contract was not of the essence of specific performance, but merely a means provided for reaching a reasonable and fair valuation or other settlement of the question in controversy, the court either deciding the question or referring it to a master, referee, or other officer for such determination.²⁵³ It should be clear that a defaulting party should not be permitted to prevent arbitration by refusal to appoint an arbitrator or otherwise join in the arbitration as the contract provides. The cases above referred to enforced specific performance either by having the court decide the matter in controversy or by submitting it to an appointee of the court for decision. The defaulting party is in no position to object to such action. The arbitration acts make it clear that specific performance of these contracts may readily and fairly be enforced by the court's appointment of an arbitrator in behalf of a defaulting party or in the place of an arbitrator who will not or cannot act. In the states without such statutes we may reasonably expect to see these contracts specifically enforced hereafter, the fallacious character of the objections thereto having been so completely exposed under the cases. Here equity definitely was found wanting, making necessary the legislation that provides for specific performance of arbitration contracts.

Lack of space compels a very brief reference to the development of specific performance of affirmative contracts extending over long periods of time and involving many details of execu-

tion. It will always be true that most contracts of this nature, particularly construction contracts, may best be enforced at law. In the usual case it will be more expedient to have the work done by a contractor who is willing to do it, holding the defaulting contractor in damages for cost of completion in excess of the contract price, than to enforce specific performance. In many situations, however, damages are clearly an inadequate remedy. An obvious situation of this kind is one where the work must be done on the property of the defendant so that the plaintiff cannot have the work done by another and recover the cost. In these cases the courts have never hesitated to decree specific performance, ridiculing the objections advanced in the older cases that superintendence by the court would be necessary. Proof of failure to perform may be left to the other party, and a finding of non-performance by the court in a proceeding to punish for contempt is surely as simple a matter as such a finding by the jury in an action for damages.³⁵⁴ Contracts by a vendor or a landlord to make improvements as part of a contract of sale or of a lease of real property are other cases in which damages at law, compelling the purchaser or tenant to finance and direct such improvements, are unfair and inadequate as a remedy; these cases call for specific performance, which gives to each party exactly what he is entitled to under the contract.³⁵⁵ Fanciful objections to specific relief have been forced to give way where such relief was definitely superior to damages at law.

Equitable relief against forfeiture is the basis of the rule in equity that even though time be expressly made "of the essence" the purchaser in default may, nevertheless, enforce specific performance of a contract to purchase land, provided he has acquired a substantial interest in the property by payments made by him or by taking possession and improving the property. Though performance on time is an express condition precedent

at law when time is made expressly of the essence, so that at law the vendor could refuse to go on with the contract when the purchaser is in default, equity treats the condition as security for performance, holding that a later payment with interest accomplishes the purpose of the condition and relieves the purchaser of his default.¹⁵⁶ Equity acts in these cases on the same principle as is applied to relief of mortgagors in default on payment of the mortgage debt when due and to relief of tenants from forfeiture for breach of condition calling for the payment of money only, such as the payment of rent or taxes. How far the doctrine of substantial performance of contracts as developed in equity in specific-performance cases influenced courts of law to apply a similar principle to conditions implied in law is a nice question. The implied conditions calling for performance by either party before he could hold the other party for breach of contract were, of course, creatures of the courts employed to work out justice, and, therefore, subject to modification as justice required. The doctrine has all the marks of an equitable origin.¹⁵⁷

Modern developments have not done much to clarify the vendor-purchaser relation. Under the cases it is settled law that a valid contract for the sale of land, which may be specifically enforced, makes the purchaser owner of the property in equity so that if his death occurs prior to the transfer of title the property passes to his heirs or under his will as real property. The vendor retains the legal title only as security for the payment of the purchase price, and on his death his right to the purchase money passes to his personal representative as personal property, secured by the legal title, which passes to his heir for that purpose only. A conveyance by the vendor to a third person who is not a purchaser for value without notice simply substitutes such a person as owner of the right to the purchase money, secured by the legal title, without effecting any change in the rights of the purchaser.

A sale or assignment by the purchaser transfers his equitable interest in the property, though the assignee is not personally liable to pay the purchase money until he elects by some definite action to enforce the contract against the vendor. It is the fashion to say that all this results from the doctrine of equitable conversion. Professor Langdell has made clear that equitable conversion cannot affect the right or interest of the purchaser until the date fixed for performance of the contract. The doctrine that equity will treat as done that which ought to be done under the contract has no application until after default on the day fixed for performance, as it is not agreed that anything need be done prior to that date.²⁵⁸ The true basis of this law is that the contract gives to the purchaser the real ownership of the land, in fact and substance—the vendor retaining in his own right possession, rents, and profits for the interval until performance, because the parties so intend, and the legal title as security for the price. The right to specific performance creates in the purchaser equitable ownership *in rem*, and the action enforcing that right is in the nature of an action *in rem*, like ejectment at law, for the recovery of the plaintiff's property.²⁵⁹

This question is of prime importance in determining where the risk of loss from fire or other casualty shall fall during the interval between the making of the contract and the date for its performance. The general rule established in most states and in England is that the loss falls on the vendee.²⁶⁰ In Massachusetts, New Hampshire, and some other states, apparently growing in number, the rule is *contra*.²⁶¹ The prevailing view is based on the substantial actual ownership of the vendee. The opposing view is based on the transaction as an executory contract which at law is unenforceable against the vendee after substantial destruction of improvements on the land by fire or other casualty. The latter view has the advantage of according more nearly with the popu-

lar understanding of the transaction. The prevailing view is in accord with the general principle that the loss should fall on the real owner, the purchaser, rather than on the vendor, who has title to the property only as security for the price. Whether the modification of the law involved in the enforcement by equity of the purchaser's equitable interest as substantial ownership represents progress or the reverse is a debatable question.¹⁶² Certainly the law is thoroughly settled generally except in the cases involving loss from fire or other casualty. The expediency and justice of assuring to the purchaser the property which he has purchased, subject to the vendor's right to the possession and income and to the legal title as security for the price, seem entirely clear. The logical result should be that loss from fire or other casualty should fall on the purchaser as decided by the prevailing cases. Transfer of possession to the purchaser prior to the fire in these cases seems to make no difference. Risk of loss depends on ownership, not on possession.¹⁶³ Practical difficulties arising out of the personal character of fire-insurance contracts, which makes them enforceable only by the vendor, who normally holds the insurance in these cases, are eliminated by decisions, which have become the prevailing law in most jurisdictions, that his recovery from the insurance company is impressed with a trust in favor of the purchaser,¹⁶⁴ though the English cases and cases in some states are *contra*,¹⁶⁵ some holding that after the loss has been paid to the vendor the insurance company may by subrogation against the purchaser recover the amount so paid.¹⁶⁶

Equitable Easements and Restrictions

Restrictions on the use of land were created and enforced in the early common law only by using conditions subsequent to forfeiture for breach. The doctrine of covenants running with the land and the application to restrictions of the law of easements

between dominant and servient estates were necessarily ineffective since the only remedy at law was limited to damages. The modern remedy in equity specifically enforcing such restrictions as easements enforceable by any owner of the dominant estate against any owner of the servient estate who is not a purchaser for value without notice, whether or not the restriction is enforceable at law as a covenant running with the land, though originating in the form of specific enforcement of such covenants,¹⁶⁷ has made these restrictions rights *in rem* in the owner of the dominant estate, running with the land as a benefit and with the servient estate as a burden.¹⁶⁸ This development has been the result of modern cases, which requires no elaboration here.

A situation demanding correction in the law exists where such restrictions are made conditions by express provisions for forfeiture in case of breach. In equity an injunction will be denied and in the better considered cases the restriction will be removed as a cloud on title when changed conditions in the neighborhood make impossible the original purpose of the restriction, so that its enforcement will do the owner of the dominant estate no good and its continued existence will serve merely to interfere with the reasonable use and development of the servient property.¹⁶⁹ Its removal as a cloud seems to be based on the theory that it was created to continue only so long as its beneficent purposes were possible of accomplishment.¹⁷⁰ Under the cases, if the restriction is made a condition by express provision for forfeiture the courts cannot give effect to it as a covenant only, but must enforce the forfeiture expressly provided for.¹⁷¹ The courts could solve the problem by applying to conditions the same doctrine as that which some of the courts have applied to restrictive covenants, declaring them at an end when the purpose for which they were created becomes impossible of accomplishment. This would be in every way a reasonable and practical doctrine. In New York the

right of the dominant owner to recover damages, which must be nominal in cases where equity would refuse an injunction, results in keeping alive a restriction without purpose or benefit to any one, operating only as an antisocial interference with the enjoyment and alienation of the burdened property.¹⁷² There is little probability, therefore, that, in that state, restrictive conditions involving forfeiture will be declared at an end when their purpose can no longer be accomplished. There is some authority for this doctrine elsewhere.¹⁷³ Certainly we should not continue to tolerate the enforcement of forfeitures for breaches of conditions that are mere arbitrary encumbrances of ownership and enjoyment, without reason or purpose.

Fraud and Mistake

We have seen how equity initiated relief for fraud and deceit in the fifteenth century, and, when in the seventeenth century the action on the case for fraud was established, how equity relinquished jurisdiction except where damages would be inadequate. Rescission for fraud, starting in equity in specialty cases, developed at law contemporaneously with *assumpsit*.¹⁷⁴ The differences between rescission at law and in equity were technical and have necessarily disappeared under code merger of law and equity.¹⁷⁵ As rescission operates to restore title to personality secured by fraud, *replevin* or conversion in favor of the defrauded vendor, and an action to recover the price by the defrauded purchaser, are entirely adequate remedies at law; intervention by equity is necessary only where land or stock has to be retransferred, requiring specific enforcement by the contempt process.¹⁷⁶ In cases where fraud gives rise to resulting trusts in equity even though the law gives a remedy in quasi-contract, equity retains jurisdiction as in other similar cases of unjust enrichment.¹⁷⁷

Modern cases have decided the fact that guilty knowledge is not essential to fraud as the basis of rescission. It should be entirely

clear that under code merger this must be true in all cases whether they be called "legal" or "equitable."¹⁷⁸

In cases of mistake code merger makes important practical differences in many ancient rules of law. Thus the parol evidence rule prevents proof at law of parol reservations of trees, crops, or fixtures in conveyances of land. Equity, however, will reform the deed on satisfactory proof of the mutual intent to make such reservations, and as this will be done in any law action under code merger it follows in effect that the reservation is actually enforced as though in the deed.¹⁷⁹ Contracts affected by mutual mistake are enforced as the parties intended them to be, with the mistake corrected, not as actually made. Though the action is at law on the contract it is always in equity also in code states for any such modification of result as equitable principles make necessary.¹⁸⁰

Unilateral-mistake cases, as they are being decided in modern times, present an odd twist to the student of the law of contracts. Where a purely unilateral mistake is made, as in making a bid, but discovered before any performance or change of position has taken place, a valid legal contract arises, enforceable at law as made. Equity, in a considerable number of cases, because of the hardship involved, will relieve the party from specific performance where otherwise the contract would be specifically enforced,¹⁸¹ and sometimes even from liability for damages when the recovery of such damages would amount to the taking of an unconscionable advantage and when the *status quo* may readily be restored without material injury to the other party.¹⁸² The effect of these cases on the law of mutual assent in contract demands careful consideration.

Bills Quia Timet and Statutes Permitting Declaratory Judgments

Quia timet relief is given in equity to compel a defendant to litigate at once a claim against the plaintiff which he is asserting but taking no affirmative action in the courts to enforce. The pur-

pose is to remove the threat of the ultimate enforcement of an invalid claim and to eliminate the danger that the plaintiff's defense may be destroyed either by loss of evidence or by the transfer of the right of action, when negotiable, to a purchaser for value without notice.¹⁸³ Bills to remove cloud on title involve, in addition, interference with the plaintiff's power to sell and convey his property because of the invalid claim of title or interest asserted by the defendant.¹⁸⁴

In these cases the courts have refused to consider such claims not presently enforceable by some form of relief. A present accrued right of action against the plaintiff, on which the defendant has withheld action in the courts, or a present claim to at least a future contingent interest in the property affected is essential to the acceptance of jurisdiction by the courts. Yet the principle of declaratory judgments had been recognized and applied, prior to the enactment of the statutes, in several different classes of cases. Trusts will be declared to exist and to be impressed on property where the legal owner denies the existence of the trust, though no relief is sought other than the declaration of the plaintiff's right.¹⁸⁵ Equitable mortgages will be declared to exist though the time for the enforcement of the mortgage may be far in the future.¹⁸⁶ Claims against the estate of a decedent, to accrue long after the time in which settlement and distribution of the estate will take place, will be presently litigated and declared to be valid against the estate, and provision for their payment when they eventually accrue will be directed.¹⁸⁷ But in these cases either present rights *in rem* are directly involved and demand protection in equity as in the first two classes of cases above referred to, or justice obviously demands equitable intervention in order to protect valid rights from destruction. It would be a long step for equity to assume jurisdiction as broad as that created by the declaratory-judgment statutes. No doubt the step could have been taken and

would have been a wise extension of equitable relief. Declaratory-judgment statutes providing for the litigation of controversies in which all that is sought is a binding and final judicial declaration of the rights of the parties so that they may safely proceed in the exercise of such rights have been enacted in many states and their validity has been fully established.¹⁸⁸ How far the courts of other states may go in adopting and applying the principles of these statutes as part of their equity jurisdiction is an interesting question. There can be no real doubt that the power exists and that the expediency of this development in the law is now generally recognized.

NOTES

¹ For a brief history of the origin and early development of equity, with a citation and discussion of most of the important authorities, see WALSH, *EQUITY* (1930) 1-40.

² Barbour, *The History of Contract in Early English Equity* (1914) 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 105-158. All of Barbour's monograph should be read by every student of equity. Holdsworth relies on it almost exclusively in his treatment of this topic. 5 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1922-1926) 294-297.

³ *Id.* at 294 *et seq.*, 301.

⁴ Ames, *History of Assumpsit* (1909) 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 260; 3 HOLDSWORTH, *op. cit. supra* note 2, at 430 *et seq.*; WALSH, *HISTORY OF ANGLO-AMERICAN LAW* (2d ed. 1932) 341-345.

⁵ 3 HOLDSWORTH, *op. cit. supra* note 2, at 407, giving as typical examples several cases from the Year Books.

⁶ 42 Ass. pl. 8, 3 HOLDSWORTH, *op. cit. supra* note 2, at 407.

⁷ *Id.* at 407, 408.

⁸ 5 *id.* at 417, n. 1.

⁹ Barbour, *supra* note 2, at 23, 85-88, 94-97; 5 HOLDSWORTH, *op. cit. supra* note 2, at 292; AMES, *LECTURES IN LEGAL HISTORY* (1913) 234, and cases cited from 1377 to 1443.

¹⁰ As to fraud and other defenses to specialty contracts enforced in equity by affirmative action, see WALSH, *op. cit. supra* note 1, at 99 *et seq.*

¹¹ As to rescission for fraud, see *id.* at 491 *et seq.*

¹² See *id.* at 90-91, 495 (as to constructive trusts in fraud cases enforced at law by quasi-contractual action where unjust enrichment is involved).

¹³ Ames, *Disseisin of Chattels* (1909) 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 580-581; 1 BEALE, *CONFLICT OF LAWS* (1935) § 152; Holdsworth, *History of Choses in Action by the Common Law* (1920) 33 HARV. L. REV. 997-1003; WALSH, *op. cit. supra* note 4, at 127-131.

²⁴ Barbour, *supra* note 2, at 108; Cook, *The Alienability of Choses in Action* (1917) 29 HARV. L. REV. 821 and note.

²⁵ WALSH, *op. cit. supra* note 4, at 131, 372-376 and authorities there cited.

²⁶ On this development see Cook, *The Alienability of Choses in Action* (1917) 29 HARV. L. REV. 816, and *Alienability of Choses in Action* (1917) 30 HARV. L. REV. 449; Williston, *Is the Right of the Assignee of a Chose in Action Legal or Equitable?* (1917) 30 HARV. L. REV. 97; Williston, *The Word Equitable and Its Application to Choses in Action* (1918) 31 HARV. L. REV. 822. These articles should be carefully read as a most valuable and clarifying discussion of the relation between law and equity, Professor Cook establishing conclusively that the assignee is the legal as well as the equitable owner of the chose, recognizing, however, that the technical legal title in the sense of the doctrine of purchaser for value without notice does not pass to the assignee as he takes subject to defenses, offsets, and counter-claims. Professor Williston makes clear that the term "equitable" is the better term to apply to the right and interest of the assignee, since it originated in equity and became concurrently legal by adoption into the law, but without changing the rule in equity that the assignee takes subject to defenses, offsets, and counter-claims whether a purchaser for value without notice or not. See WALSH, *op. cit. supra* note 1, at 90-94.

²⁷ For a detailed account of this development see WALSH, MORTGAGES (1934) 19-33.

²⁸ For the development of jurisdiction of equity over mortgages see *id.* at 6-13.

²⁹ *Id.* at 13-15.

³⁰ See citations in notes 17, 18, and 19, *supra*. For a discussion of the failure in England to recognize at law this development in equity as controlling law in spite of the merger of law and equity under the Judicature Acts, and the absurdities which have resulted in the English cases, see WALSH, *op. cit. supra* note 17, at 17-19. This change at law necessarily involved the abandonment of equity's position that the legal title was held by the mortgagee. Substantial adoption at law of the equity view involved the holding that legal title was in the mortgagor and that the mortgagee had a legal lien instead of legal title as security.

³¹ Kelley v. Riggs, 2 Root 126, (Conn. 1794); Underwood v. Staney, 1 Ch. Cas. 77, 22 Eng. Rep. 703 (1666). Probably the first case in which a law court adopted the equity view was Reed v. Brookman, 3 Term Rep. 151, 100 Eng. Rep. 504 (1789). See Ames, *Specialty Contracts and Equitable Defenses*, in his LECTURES ON LEGAL HISTORY (1913) 104.

³² See notes 76-78, and text, *infra*.

³³ Collins v. Blantern, 2 Wils. 341, 95 Eng. Rep. 847 (1767).

³⁴ Reinsch, *The English Common Law in the Early American Colonies* (1907) 1 SELECT ESSAYS IN ANGLo-AMERICAN LEGAL HISTORY 367, 373-374. As to the other New England Colonies, see Reinsch, *id.* at 386-390; WALSH, *op. cit. supra* note 4 (1934) at 85-87. As to New Jersey, see Reinsch, *supra*, at 394-396; WALSH, *op. cit. supra* note 4, at 88.

³⁵ Reinsch, *supra* note 24, at 401-408; WALSH, *op. cit. supra* note 4, at 87, 89-90.

³⁶ Wilson, *Courts of Chancery in America—Colonial Period* (1884) 18 AM. L. REV. 226, 227; Woodruff, *Chancery in Massachusetts* (1889) 5 L. Q. REV. 370, 372.

³⁷ Woodruff, *id.* at 372; Wilson, *supra* note 26, at 227-229.

³⁸ Woodruff, *supra* note 26, at 373.

³⁹ *Id.* at 373.

⁴⁰ Wilson, *supra* note 26, at 230-231; Woodruff, *supra* note 26, at 376 and note.

³¹ *Id.* at 376.

³² Wilson, *supra* note 26, at 232, 233; 1 Belnap, 162-163; Wells v. Pierce, 27 N. H. 512 (1853). Opinion *per* Bell, J.

³³ Wilson, *supra* note 26, at 233-236, citing 3 COL. REC. 550-551; 4 *id.* at 136-137; 5 *id.* at 23, 76.

³⁴ 1 NEW HAVEN COL. RECORDS, 191, cited Wilson, *supra* note 26, at 236-237.

³⁵ *Ibid.*, citing Smucker, *Blue Laws of Conn.* 22.

³⁶ *Id.* at 238, citing 3 COL. REC. OF CONN. 413.

³⁷ *Ibid.*, citing 6 COL. REC. OF CONN. 444-445.

³⁸ See Statements, not documented, (1897) in 56 ALBANY L. J. 173.

³⁹ DOCUMENTS RELATING TO COLONIAL HISTORY OF NEW YORK, 721, 834, 844; 5 *id.* at 298, cited Wilson, *supra* note 26, at 238, 239.

⁴⁰ *Id.* at 239, citing 5 DOCUMENTS RELATING TO COLONIAL HISTORY OF NEW YORK, 882, 252, 298.

⁴¹ *Id.* at 239, citing MAG. AM. HIST., March 1879.

⁴² *Id.* at 240-241; 2 Smith, *History of New York* 24.

⁴³ Fisher, *Equity Through Common Law Forms* (1885) 1 L. Q. REV. 445-457, and citations; Wilson, *supra* note 26, at 245-247. The assembly insisted that a court of equity could be erected only by act of the assembly.

⁴⁴ *Id.* at 247-250.

⁴⁵ *Id.* at 250-251.

⁴⁶ *Id.* at 252-254.

⁴⁷ Beale, *Equity in America* (1921) 1 CAMBRIDGE L. J. 21-23.

⁴⁸ Proctor, *Origin of Chancery Courts in New York* (1897) 56 ALBANY L. J. 173.

⁴⁹ 1 STORY, EQUITY JURISPRUDENCE (4th ed.) § 58, citing 4 KENT, COMMENTARIES 163 n (d), also Preface to Campbell and Cambreling's AMERICAN CHANCERY DIGEST (1828); FONBLANQUE, EQUITY (Laussat ed. 1826) 11-20.

⁵⁰ See note 30, *supra*.

⁵¹ WOODRUFF, CHANCERY IN MASSACHUSETTS, 370, 377-385.

⁵² See Reinsch, *supra* note 24, at 397-400, citing Duke of York's Laws, Laws of 1682, c. 6, 7, 16, 24, and other statutes.

⁵³ See note 43, *supra*, and text.

⁵⁴ Swift v. Hawkins, 1 Dallas 17 (1768). Mr. Fisher says, in *Equity Through Common Law Forms* (1885) 1 L. Q. REV. 458, that this is the first reported case of the kind. The Chief Justice said that he had known this as the constant practice of the province for thirty-nine years, bearing out the assertion in BRIGHTLY, EQUITY IN PENNSYLVANIA, 5, that this was true from the beginning.

⁵⁵ Kennedy v. Fury, 1 Dallas 72 (1783). Fisher, *loc. cit.* *supra* note 54.

⁵⁶ Wharton v. Morris, 1 Dallas 125 (1785).

⁵⁷ See Mr. Fisher's discussion and citations, *supra* note 54, at 459. As to the trial of questions of fact in equity issues arising in jury cases under the New York Code, see WALSH, *op. cit.* *supra* note 1, at 118.

⁵⁸ See Read v. Brookman, 3 Term Rep. 151, 100 Eng. Rep. 504 (1789).

⁵⁹ Commonwealth v. Coates, 1 Yeates 2 (1791).

⁶⁰ For citations of cases and statutes on these matters see Fisher, *supra* note 54, at 461.

⁶¹ Clyde v. Clyde, 1 Yeates 92 (1791) and other cases cited in Fisher, *supra* note 54, at 462, n. 1.

⁶² See *id.* at 465. Mr. Fisher, *id.* at 463-464, gives an account of the struggle to

prevent this establishment of equity and of the futility of attempting to give in legal forms of judgment and execution the kinds of specific relief which equity affords. How far the colonial codes in Pennsylvania, which sought to merge legal and equitable relief but without the adoption of specific enforcement by the contempt process, were responsible for this development of equity enforced at law is an interesting question which will probably remain a matter of conjecture. It would be a solution of what has been generally regarded as a kind of legal mystery.

⁶³ See discussion thereof, *supra* notes 50-62, and text to which they refer.

⁶⁴ From Pound, *Review of Cook, Cases on Equity* (1924) 37 HARV. L. REV. 397.

⁶⁵ That these treatises contributed in a most important way to the establishment of equity in the United States, overcoming the opposition of puritan individualism, and supplying the means by which education overcame, in some measure, ignorance and misunderstanding of equity jurisdiction as part of our Anglo-American system of law, see Pound, *The Place of Judge Story in the Making of American Law* (1914) 48 AM. L. REV. 676, 695-696.

⁶⁶ For a discussion of the historical reasons for this development see WALSH, *op. cit. supra* note 1, at 16-17, 19.

⁶⁷ Hohfeld, *The Relations Between Equity and the Law* (1913) 11 MICH. L. REV. 537, 553, 597; HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) 131, 133, 136; BEALE, *CONFLICT OF LAWS* (1935) 151, 152.

⁶⁸ See list of these states with dates when the Code was adopted in CLARK, *CODE PLEADING* (1928) 19, also HEPBURN, *DEVELOPMENT OF CODE PLEADING* (1897) 88, 89.

⁶⁹ New Jersey, Delaware, Alabama, Arkansas, Mississippi, and Tennessee are the states referred to. See CLARK, *op. cit. supra* note 68, at 47.

⁷⁰ See notes 68, 69, *supra*.

⁷¹ See WALSH, *op. cit. supra* note 1, § 21, and cases there cited, nn. 7, 8, 9; CLARK, *op. cit. supra* note 68, at 427 *et seq.*; Cook, *Equitable Defenses in Law Actions* (1923) 32 YALE L. J. 645.

⁷² Clark and Moore, *A New Federal Civil Procedure: I The Background* (1935) 44 YALE L. J. 387; *II Pleading and Parties*, *id.* at 1291.

⁷³ See, for example, opinion by Judge Seldon in *Reubens v. Joel*, 13 N. Y. 488, 491 (1856).

⁷⁴ See subdivision "Reforms in the Law Accomplished by Equity Prior to 1835," *ante*.

⁷⁵ See *id.* nn. 13-16, *ante*, and text.

⁷⁶ WALSH, *op. cit. supra* note 1, at 99 *et seq.*

⁷⁷ *Martin v. Smith*, 102 Me. 27, 65 Atl. 257 (1906) (holding that an omission by mistake from a mortgage deed could not be set up as a defense to an action to recover possession thereunder; that a separate suit in equity to reform the deed was necessary, though the Maine statute providing for equitable defenses provides that the defendant "shall receive such relief as he would be entitled to receive in equity, against the claims of the plaintiff"); *Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205 (1897) (holding that fraud as a reply to an answer setting up a release in a tort action required a separate action in equity or as a counter-claim, though Missouri has the code merging law and equity. A later statute provides for a reply in such cases. See *Non-Royalty Shoe Co. v. Phoenix Ins. Co.*, 277 Mo. 399, 210 S. W. 37 [1919]); *Keatley v. U. S. Trust Co.*, 249 Fed. 296 (C. C. A. 2d, 1918); *Rudolph Wurlitzer Co. v. Rossman*, 196 Mo. App. 78, 190 S. W. 636 (1916) (holding that mistake could not be set up as a defense, and that

mistakes "may be relieved in a court of equity, but are not cognizable in a court of law in a purely legal action." This in a code state making courts and actions concurrently legal and equitable! See Hinton, *Equitable Defenses under Modern Codes* (1918) 18 MICH. L. REV. 717. (Professor Hinton says: "An equitable defense to a legal right of action involves a contradiction in terms. Either the equity is no defense at all, or it has become a legal defense.") See Cook, *supra* note 71, at 645 (making clear that these defenses were necessarily enforced in equity in the form of affirmative actions, but with the sole purpose of barring enforcement of the law action—a defense to that action, and that under the Code and other statutes the setting up of these defenses in the law action does not in any way change their character as equities. Law and equity are simply brought together in the same action. The court is concurrently a court of both law and equity and the action is both legal and equitable if both legal and equitable issues are to be determined. To speak of "a court of law" or "a court of equity" in a code state is inaccurate, as all courts of general jurisdiction are both at the same time and not distinctively one or the other.

⁷⁸ See opinion of Taft, C. J., in *Liberty Oil Co. v. Condon Nat. Bank*, 260 U. S. 235, 43 Sup. Ct. 118 (1922): "If a defendant at law had an equitable defense, he resorted to a bill in equity to enjoin the suit at law, until he could make his equitable defense effective by a hearing before the chancellor." In that case the equity (interpleader) involved new affirmative relief and therefore had to be asserted as a counter-claim. See additional cases and other authorities cited in WALSE, *op. cit. supra* note 1, at 101-106.

⁷⁹ *L. Martin Co. v. L. Martin & Wilkes Co.*, 75 N. J. Eq. 39, 71 Atl. 409 (1908); 75 N. J. Eq. 257, 72 Atl. 294 (1908); *Keppel v. Lehigh Coal & Nav. Co.*, 200 Pa. 649, 50 Atl. 302 (1901).

⁸⁰ *Gamage v. Harris*, 79 Me. 531 (1887); *Jesus College v. Bloom*, Ambler 54, 27 Eng. Rep. 31 (1745). See also preceding note.

⁸¹ *White v. Lyons*, 42 Cal. 279 (1871); *Marquat v. Marquat*, 12 N. Y. 336, 341 (after answer "the court may grant the plaintiffs any relief consistent with the case made by the complaint and embraced within the issues. In case no answer has been put in, the relief granted cannot exceed that demanded in the complaint. In the former case the demand of relief in the complaint becomes immaterial"); *Phillips v. Gorham*, 17 N. Y. 270 (1858); *Barlow v. Scott*, 24 N. Y. 40 (1861) (damages instead of specific performance allowed where the latter was impossible though it was the only relief asked).

Equitable relief will be given in law cases: *Emery v. Pease*, 20 N. Y. 62 (1859) (complaint insufficient at law on account stated; held sufficient to sustain action in equity for an accounting "If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled"); *N. Y. Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357 (1861).

⁸² *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135 (1901). In *Syracuse v. Hogan*, 243 N. Y. 457, 138 N. E. 406 (1923) the court decided only that the action to compel defendant to remove an encroaching building was an action of ejectment requiring its transfer to trial term for jury trial, in no way questioning the law laid down in *Hahl v. Sugo*. In the *Syracuse* case, the court could, and no doubt did, grant a mandatory injunction in the alternative if the judgment in ejectment should not be effective.

⁸³ *Jackson v. Strong*, 222 N. Y. 149, 118 N. E. 512 (1917).

⁸⁴ *Poth v. Washington Sq. M. E. Church*, 207 App. Div. 219, 201 N. Y. Supp. 776 (1923).

⁸⁵ See citation of these cases in CLARK, *op. cit. supra* note 68, at 50, also later cases *contra*.

⁸⁶ *Saperstein v. Mechanics & Farmers Sav. Bank*, 228 N. Y. 257, 126 N. E. 708 (1920).

⁸⁷ *Selden, J.*, in *Reubens v. Joel*, 13 N. Y. 488 (1856), is one of many such statements.

⁸⁸ See *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135 (1901); *Syracuse v. Hogan*, 243 N. Y. 457, 138 N. E. 406 (1923).

⁸⁹ *Gunn v. Madigan*, 28 Wisc. 158 (1871). See list of cases from California, Colorado, Idaho, Iowa, Kentucky, Montana, Nebraska, Nevada, North Dakota, Ohio, and several other states cited in CLARK, *op. cit. supra* note 68, at 61, 62, n. 70.

⁹⁰ *King v. Internat. Lumber Co.*, 156 Minn. 494, 195 N. W. 451 (1914); *Citizens Trust Co. v. Going*, 288 Mo. 505, 232 S. W. 996 (1921). See additional Missouri cases cited CLARK, *op. cit. supra* note 68, at 63, n. 73.

⁹¹ In *Susquehanna S. S. Co. v. A. O. Anderson & Co.*, 239 N. Y. 285, 146 N. E. 381 (1925), the Court of Appeals declared that equitable defenses in jury cases must be tried to the jury as part of the entire case, though equitable counter-claims calling for affirmative equitable relief and issues of fact in actions seeking equitable and legal relief in the same action are triable to the court where they are involved in the equitable relief sought. This decision is based partly on the general practice in New York of submitting such issues involving equitable defenses to the jury in a general charge covering the entire case, and partly to the language of Section 425 of the New York Civil Practice Act, providing that trial by jury is mandatory in actions for a sum of money only, ejectment, dower, waste, nuisance, and to recover a chattel. It is settled beyond doubt that actions "to recover a sum of money only" are limited under this section to common-law actions, and do not include actions in equity for an accounting, actions to reform a contract for mistake and to enforce it as reformed. The actions for a nuisance or for waste under Section 425 do not include equity actions to restrain nuisances or waste and to recover damages. See cases cited WALSH, *op. cit. supra* note 1, at 120, nn. 11, 13. The court must have regarded equitable defenses as becoming legal merely because they may be set up in these actions triable by jury. It is too clear for serious argument that they are equitable in their origin and nature and that they are not changed by being made available in the code civil action in which all issues, legal and equitable, are united. It would be just as reasonable to treat legal rights as converted into purely equitable rights because they will be recognized and enforced in equity. These equitable issues were not recognized at law or triable by jury when the Constitution established mandatory trial by jury in law cases. In all other instances of equitable relief merged with legal relief admittedly the right to jury trial does not exist. This treating of equitable defenses as differing in their merger from other equities is an odd mistake without basis other than the confusion above referred to. Its chief danger is in keeping that confusion alive.

⁹² See Clark and Moon, *A New Federal Procedure* (1935) 44 YALE L. J. 387 *et seq.* and 1291 *et seq.*

⁹³ 2 STONY, *op. cit. supra* note 49, at 206-237.

⁹⁴ 2 *id.* at 248. Story's very brief and inadequate treatment of waste in equity is limited to six short pages, *id.* at 244-249.

⁹⁵ See Lyon, J., in *Poertner v. Russell*, 33 Wisc. 193 (1873).

⁹⁶ For a summary of the law of equitable waste see WALSH, *op. cit. supra* note 1, at 142-146.

⁹⁷ *Id.* at 144-145, n. 40.

⁹⁸ STORY, *op. cit. supra* note 49, at 260, 262. Very few cases are cited, and only two brief paragraphs are devoted to the subject. The then recent development of this law through Lord Eldon's decisions is indicated.

⁹⁹ See WALSH, *op. cit. supra* note 1, at 147-151.

¹⁰⁰ Williams v. N. Y. Central R. Co., 16 N. Y. 97 (1857), and many other cases cited, WALSH, *op. cit. supra* note 1, at 153-155.

¹⁰¹ LUX v. Haggin, 69 Cal. 255, 4 Pac. 919 (1886); West Point Iron Co. v. Reymart, 45 N. Y. 703 (1871); Broiestedt v. South Side R. Co., 55 N. Y. 220 (1873), and other cases cited, WALSH, *op. cit. supra* note 1, at 164, n. 45.

¹⁰² D. L. & W. R. Co. v. Breckenridge, 55 N. J. Eq. 141, 35 Atl. 756 (1896). See cases cited, WALSH, *op. cit. supra* note 1, at 159-161, nn. 35-39.

¹⁰³ Attorney-General v. Cleaver, 18 Ves. 211, 34 Eng. Rep. 297 (1811); Crowder v. Tinkler, 19 Ves. 617, 34 Eng. Rep. 645 (1816).

¹⁰⁴ Van Bergen v. Van Bergen, 3 Johns. Ch. 282 (N. Y. 1818).

¹⁰⁵ (1908) 47 U. OF PA. L. REV. 289 (O.S. Vol. 56).

¹⁰⁶ WALSH, *op. cit. supra* note 1, at 176, n. 23, and cases there cited and discussed.

¹⁰⁷ *Id.* at 177, n. 24, cases cited and discussed.

¹⁰⁸ *Id.* at 189.

¹⁰⁹ See citation of such early cases in Attorney-General v. Richards, 2 Anstruther, 603 (Exch. 1795).

¹¹⁰ See form of writ in Herbert's NEW NATURA BREVIVM, 185 D. (prior to 1537) directed to the mayor and his bailiffs of Oxford ordering them to keep the streets clear of various kinds of foulness dangerous to the public health. See Bond's Case, Moore, 238, No. 372 (1587), restraining a tenant from building and maintaining a pigeon house as a common nuisance.

¹¹¹ Baltimore v. Board of Health, 139 Md. 210, 115 Atl. 43 (1921); Attorney-General v. Jamaica Pond, etc. Corp., 133 Mass. 361 (1882); Pine City v. Munch, 42 Minn. 342, 44 N. W. 197 (1890); Attorney-General v. Patterson, 58 N. J. Eq. 1, 42 Atl. 749 (1899).

¹¹² Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55 (1889); State *ex rel.* Crow v. Canty, 207 Mo. 439, 105 S. W. 1078 (1907). See cases in note following.

¹¹³ See quotations from opinions in Stead v. Fortner, 255 Ill. 468, 92 N. E. 680 (1912); Littleton v. Fritz, 65 Iowa 488, 22 N. W. 641 (1885); Attorney-General v. Jamaica Pond, etc. Corp., 133 Mass. 361 (1882), and in WALSH, *op. cit. supra* note 1, at 204, n. 103, and other cases there cited to the same effect. See *contra*, Hedden v. Hand, 90 N. J. Eq. 583, 107 Atl. 285 (1919), holding unconstitutional a statute declaring places of prostitution and for the illegal sale of liquor public nuisances and providing for their restraint by injunction in equity. Similar statutes have generally been sustained in other states. See WALSH, *op. cit. supra* note 1, at 205, nn. 105, 106.

¹¹⁴ *Id.* at 214.

¹¹⁵ Singleton v. Bolton, 3 Doug. 293, 99 Eng. Rep. 661 (1783) stating the modern rule but denying the injunction on the special facts. In Blanchard v. Hill, 2 Atk. 484, 26 Eng. Rep. 692 (1742), Lord Hardwicke denied an injunction against a wrongful use of a trade-mark by a competitor, saying: "I think it would be of mischievous consequence to do it." See NIMS, UNFAIR COMPETITION (2d ed.) § 2.

¹¹⁶ Taylor v. Carpenter, 3 Story 458 (1844). The very limited development of

this part of the law in 1835 may be seen in the very brief treatment of it by Story, 2 Story, *op. cit. supra* note 49, at 284, 285, merely touching on cases of trade-marks and trade names and disclosure of trade secrets communicated in confidence, and only a few English cases and no American cases being cited.

¹¹⁷ Leading cases of this kind include *Allen & Wheeler Co. v. Hanover Star Milling Co.*, 240 U. S. 403, 36 Sup. Ct. 357 (1916); *Hazelton Boiler Co. v. Hazelton Boiler Tripod Co.*, 142 Ill. 494, 30 N. E. 339 (1892); *Waterman v. Shipman*, 130 N. Y. 301, 311, 29 N. E. 111 (1891).

¹¹⁸ See note 116, *supra*.

¹¹⁹ *Stewart v. Hook*, 118 Ga. 445, 45 S. E. 369 (1903); *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068 (1890); *Haskins v. Ryan*, 71 N. J. Eq. 575, 64 Atl. 436 (1906); *Bristol v. Equitable Assur. Soc.*, 132 N. Y. 264, 30 N. E. 506 (1892); *McClary v. Hubbard*, 97 Vt. 222, 122 Atl. 469 (1923).

¹²⁰ *Kechle v. Hickinggill*, cited in note to *Carington v. Taylor*, 11 East 571, at 574, 103 Eng. Rep. 1126, at 1127 (1809) (frightening away ducks from plaintiff's decoy pond by repeatedly firing guns on defendant's adjoining land).

¹²¹ See quotations from opinions in a few of the leading cases, including *Allen v. Flood*, [1891] A. C. 1; *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 6131 (1889); *International News Service v. Associated Press*, 248 U. S. 215, 39 Sup. Ct. 68 (1918); *Hutton v. Walters*, 132 Tenn. 527, 179 S. W. 134 (1915) (a very valuable statement of principles); *Hawarden v. Youghioghny & Lehigh Coal Co.*, 111 Wisc. 545, 87 N. W. 472 (1901) in *WALSH, op. cit. supra* note 1, at 236, 237, n. 59.

¹²² The labor cases hereafter referred to include most of the situations in which the injury is committed by other than business competitors. In *National Life Ins. Co. v. Myers*, 140 Ill. App. 392 (1908), threatened gross libels against an employer's business as a means of extorting money by a former employee were enjoined as a malicious injury to business where no element of competition existed. In the labor cases the question of unfair competition as between employer and employees or between rival groups of employees is generally involved.

¹²³ "What is the measure or test by which the conduct of a combination of persons must be judged in order to determine whether or not it is an unlawful interference with freedom of employment in the labor market, and as such injurious to the employer of labor in respect of his probable expectancies, has not as yet been clearly defined. Perhaps no better definition could be suggested than that which may be framed by conveniently using that important legal fictitious person who has taken such a large part in the development of our law during the last fifty years—the reasonably prudent, reasonably courageous, and not unreasonably sensitive man." *Stevenson, V.C.*, in *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 766, 53 Atl. 230, at 233 (1902).

¹²⁴ *Vegelahn v. Guntner*, 167 Mass. 92, 107, 44 N. E. 1077 (1896) by Holmes, J.; *Hamilton-Brown Shoe Co. v. Saxe*, 131 Mo. 212, 32 S. W. 1106 (1895); *Jersey City Printing Co. v. Cassidy*, note 123, *supra*; *Davis v. Zimmerman*, 91 Hun 489, 36 N. Y. Supp. 303 (1895); *O'Neil v. Behanna*, 182 Pa. 326, 37 Atl. 843 (1897); threats to strike or to do anything else which is legal is not intimidation and is therefore proper. *Regina v. Druitt*, 10 Cox C. C. 593 (1867).

¹²⁵ *South Wales Miners' Fed. v. Glamorgan Coal Co.*, [1905] A. C. 239; *Vegelahn v. Guntner*, note 124, *supra*.

¹²⁶ *Boston Glass Manufacturing v. Binney*, 21 Mass. 425 (1827); *Beckman v. Mars-*

ters, 195 Mass. 205, 80 N. E. 817 (1907), by Loring, J.; Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927). Dicta to the contrary in Frank and Dargan v. Herold, 63 N. J. Eq. 443, 450, 52 Atl. 152, 156 (1902) and Thacher Coal Co. v. Burke, 59 W. Va. 253, 53 S. E. 161 (1906), cannot be supported. In these cases either malice was admitted by demurrer or intimidation was involved, eliminating the question of inducing breach of contract.

¹²⁷ 245 U. S. 229, 38 Sup. Ct. 114 (1917).

¹²⁸ Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927) at 134.

¹²⁹ Frankfurter and Greene, *Labor Injunctions and Federal Legislation* (1928)

42 HARV. L. REV. 766, 779; WALSH, *op. cit. supra* note 1, at 257. By Laws of 1935, c. 11, these contracts are made unenforceable in New York, either at law or in equity. For similar statutes in several other states see Note, 13 N. Y. U. LAW QUARTERLY REV. 921, n. 6. See Norris-La Guardia Act, 47 STAT. 70-73 (1932), 29 N. S. C. A., §§ 101-115, outlawing these contracts and restricting injunctions against labor.

¹³⁰ Strikes to compel unionizing of shops: Kemp v. Division No. 241A, Assn. St. and Ry. Employees, 255 Ill. 213, 99 N. E. 389 (1912); Jersey Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230 (1902); Nat. Assn. Steamfitters v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902); Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927). See additional cases cited, SAYRE, CASES ON LABOR LAW (1922) 311 n. Cases *contra* include Plant v. Woods, 176 Mass. 492, 57 N. E. 1011 (1900), strong dissenting opinion by Judge Holmes; Folsom v. Lewis, 208 Mass. 336, 94 N. E. 316 (1911); Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N. E. 801 (1917). Later Massachusetts cases sustaining the validity of trade agreements between employees and unions providing that only union members should be employed when available greatly weaken these cases. See Hoban v. Dempsey, 217 Mass. 166, 104 N. E. 717 (1914); Shinsky v. O'Neill, 232 Mass. 99, 121 N. E. 790 (1919). Ruddy v. United Assn. Journeymen Plumbers, etc., 79 N. J. L. 467, 75 Atl. 742 (1910), held the union in damages for procuring the plaintiff's discharge in order to force him to join the union, but this case is opposed to New Jersey cases clearly establishing the general rule. See Mayer v. Journeymen Stonecutters' Assn., 47 N. J. Eq. 519, 20 Atl. 492 (1890); Jersey City Printing Co. v. Cassidy, *supra*. Bausbach v. Reiff, 244 Pa. 559, 91 Atl. 224 (1914), cited in the Ruddy case for its holding, is not *contra* to the general rule, as the plaintiff's discharge was induced merely to injure him, not to promote union interests.

Boycotting of open-shop goods: Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917); Auburn Draying Co. v. Wardell, 227 N. Y. 1, 124 N. E. 97 (1919). *Contra*: Bedford Cut Stone Co. v. Journeymen Stone Cutter's Assn., 274 U. S. 37, 47 Sup. Ct. 522 (1927); Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N. E. 801 (1917), and other Massachusetts and federal cases cited in WALSH, *op. cit. supra* note 1, at 250, n. 87.

¹³¹ See Bedford Cut Stone Co. v. Journeymen Stone Cutter's Assn., note 130, *supra*; Duplex Printing Press Co. v. Derring, 254 U. S. 443, 41 Sup. Ct. 172 (1921). See the Norris-La Guardia Act, note 129, *supra*.

¹³² American Steel Foundries Co. v. Tri-Cities Trade Council, 257 U. S. 184, 209, 42 Sup. Ct. 72 (1921).

¹³³ Dissenting opinion of Judge Holmes in Plant v. Woods, 176 Mass. 492, 494, 57 N. E. 1011, 1015 (1900); dissenting opinion of Justice Brandeis, in Duplex Printing Co. v. Derring, 254 U. S. 443, 41 Sup. Ct. 172 (1921). See WALSH, *op. cit. supra*

note 1, at 251-258, for a discussion of modern labor problems, and whether legislation or development of the law by the courts will be the better remedy. Recent cases in the lower federal courts uphold the Norris-La Guardia Act, note 129, *supra*, by permitting picketing by an outside union to organize a nonunion shop, strikes to compel recognition of a union, and coercion of third parties in the same industry by threats of sympathetic strikes, cited and discussed in note, 13 N. Y. U. LAW QUARTERLY REV. 92, 100-101. The author's view, expressed elsewhere (WALSH, EQUITY, § 49), of the unpolity of relying mainly on legislation to settle these problems—that fundamentally the courts must do this work—seems to be sustained by difficulties developing in the operation of these statutes.

¹³⁴ Bounard v. Perryman, [1891] 2 Ch. 269.

¹³⁵ Pound, *Equitable Relief Against Defamation* (1916) 29 HARV. L. REV. 665, nn. 70, 71, 72, citing Saxby v. Easterbrook, 3 C.P.D. 339 (1878); Halsey v. Brotherhood, 15 Ch. Div. 514 (1880), 19 Ch. Div. 386 (1881), and several other cases.

¹³⁶ See, for example, N. Y. CIV. PRAC. ACT, § 878.

¹³⁷ Brandreth v. Lance, 8 Paige 23 (N. Y. 1839); Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902), and other cases cited in Pound, *supra* note 135. On the effect of code merger see Richmond v. Dubuque R. Co., 33 Iowa 422, 476 (1872), cited by Dean Pound, *supra* note 135, at 665 of his article as asserting that courts of law in such cases are controlled by the equitable principles which control courts of equity in like cases.

¹³⁸ Kidd v. Horry, 28 Fed. 773 (E. D. Pa. 1886); Smack v. Kane, 34 Fed. 46 (N. D. Ill. 1888). See additional cases cited in Pound, *supra* note 135, at 655, n. 3. Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873), is *contra*, treating the question as settled by authority and without discussion of the principles involved. This case must be treated as wrongly decided because the demurrer admitted the existence of a legal tort resulting in direct injury to business for which damages at law would be inadequate. If the publication is reasonably justified as made in protection of the defendant's rights under a competing patent, it is privileged and no tort arises. See cases above cited, particularly Kidd v. Horry, *supra*.

¹³⁹ Gompers v. Buck's Stove and Range Co., 221 U. S. 418, 31 Sup. Ct. 492 (1911); Coeur D'Alene etc. Mining Co. v. Miners' Union, 51 Fed. 260 (C. C. Idaho, 1892); Nat. Life Ins. Co. v. Myers, 140 Ill. App. 392 (1908) (such attacks by a discharged employee restrained as malicious, no competition involved); Shoemaker v. South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280 (1893), and other cases cited, Pound, *supra* note 135, at 665, n. 41.

¹⁴⁰ Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (1907) (canceling false birth certificate as child of plaintiff, and asserting that, though no property rights existed, personal rights will be protected from invasion in proper cases by equity); Edison v. Edison Polyform Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907) (restraining the use of plaintiff's photograph and name). The right of privacy was recognized and enforced in Paversick v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905), and Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918). See additional cases cited and discussion thereof in Warren and Brandeis, *The Right of Privacy* (1890) 4 HARV. L. REV. 193; Pound, *supra* note 135, at 640.

In Burns v. Stevens, 236 Mich. 443, 210 N. W. 482 (1926), the court, without asserting any property right even as a pretended basis for the injunction, enjoined the defendant from representing that she was the plaintiff's wife and from using his name.

In *Baumann v. Baumann*, 250 N. Y. 382, 165 N. E. 819 (1929), the plaintiff's status as wife of the defendant was decreed in a declaratory judgment, but the Court of Appeals refused to sustain an injunction restraining the other defendant, whom the plaintiff's husband had married after an invalid Mexican divorce, from using the name of the plaintiff's husband and from representing that she was his wife. See dissenting opinion by Judge Crane.

For additional cases and a discussion of the development of the cases in equity protecting personal rights, in many instances based on technical property rights which were not the true basis of the action of the court, see *WALSH, op. cit. supra* note 1, at 270-278.

¹⁴¹ See *id.* at 132-134, 299-301.

¹⁴² *STORY, op. cit. supra* note 49, at 28-127.

¹⁴³ *WALSH, op. cit. supra* note 1, at 299-301.

¹⁴⁴ *Bromage v. Genning*, 1 Rolle 368, 81 Eng. Rep. 540 (1616).

¹⁴⁵ *STORY, op. cit. supra* note 49, at 33 § 717a (a new section evidently added in the fourth edition published in 1846): "The truth is, that upon the principles of natural justice, Courts of Equity might proceed much farther, and might insist upon decreeing a specific performance of all *bona fide* contracts; since that is a remedy to which courts of law are inadequate. There is no pretense for the complaints, sometimes made by the common lawyers, that such relief in equity would wholly subvert the remedies by actions of the case and actions of covenant; for it is against conscience that a party should have a right of election, whether he would perform his covenant, or only pay damages for the breach of it."

¹⁴⁶ *UNIFORM SALES ACT*, § 68; *CONN. LAWS OF 1907*, c. 212; *N. Y. PERS. PROP. LAWS 149*; 2 *WILLISTON, SALES* (2d ed. 1924) § 601. Specific performance decreed under statute extending the former rule: *Hughbanks v. Browning*, 9 Ohio App. 114 (1917), and other cases cited; 1 *CHAFEE AND SIMPSON, CASES ON EQUITY* 276. *Contra*: *G. C. Outten Grain Co. v. Grace*, 239 Ill. App. 284, 286-288 (1925). See cases on this statute cited 1 *CHAFEE AND SIMPSON, CASES ON EQUITY*, 277, nn. 1, 2.

¹⁴⁷ *WILLISTON, op. cit. supra* note 146, §§ 562-565; *WILLISTON, CONTRACTS* (1920) § 1365.

¹⁴⁸ § 63 (3).

¹⁴⁹ *Glass and Co. v. Miroch*, 239 N. Y. 475, 147 N. E. 71 (1925); 3 *WILLISTON, op. cit. supra* note 147, at 2437-2442.

¹⁵⁰ *Id.* §§ 1719, 1927 (1914); 47 L. R. A. (N. S.) 337, 364 n.; 1 *CHAFEE AND SIMPSON, op. cit. supra* note 146, at 537-539, n.

¹⁵¹ *Milnes v. Gerg*, 14 Ves. 400 (1807); *Agar v. Macleay*, 2 Sim. and St. 418 (1825), and other cases cited, 1 *CHAFEE AND SIMPSON, op. cit. supra* note 146, at 529-531, nn.; 544-551.

¹⁵² *N. Y. ARBITRATION LAW*, *LAWS OF 1930*, c. 275; *FEDERAL ARBITRATION ACT*, 43 STAT. 883 (1925), 9 U. S. C. §§ 1-15 (1925). For list of statutes in the eleven other states adopting substantially the same statute (with modifications about submission to the court of questions of law in Connecticut and Massachusetts), see 1 *CHAFEE AND SIMPSON, op. cit. supra* note 146, at 553, 554, n. 5.

The *UNIFORM ARBITRATION ACT*, recommended by the Commissioners on Uniform State Laws and approved by the American Bar Association, has been adopted by North Carolina, Nevada, Utah, and Wyoming. See *CHAFEE AND SIMPSON, id.* at 555, n. 1.

For its text see STURGES, *COMMERCIAL ARBITRATION* (1930) 983-987. It differs from the New York statute followed in the other states in that it applies only to existing disputes, not to those arising in the future, and it provides for submission of questions of law to the court by the arbitrators, on the demand of either party or, in the absence of such demand, if they themselves see fit, or in the alternative they may make their award as a conclusion of fact, subject to the application of the law thereto by the court.

¹⁵³ *Castle Creek Water Co. v. Aspen*, 146 Fed. 8 (C. C. A. 8th, 1906) (the court saying "that it does not lie in his mouth to say that the court may not select the valuers as long as he wrongfully refuses to do so, and that he is estopped from taking advantage of his own wrong to prevent" specific performance); *Coles v. Peck*, 96 Ind. 333 (1884); *Hopkins v. Gilman*, 22 Wisc. 476 (1868). See cases cited in *Castle Creek Water Co. v. Aspen*, *supra*, also *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, 495, 103 N. E. 856 (1915); *Kaufmann v. Liggett*, 209 Pa. 87, 58 Atl. 129 (1904).

¹⁵⁴ Mayor, etc., of *Wolverhampton v. Emmons*, [1901] 1 K. B. 515, and additional cases cited, 1 *AMNS, CASES ON EQUITY* (1901) 78 n.

¹⁵⁵ *Brummel v. Clifton Realty Co.*, 146 Md. 56, 125 Atl. 905 (1914); *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044 (1895); *N. Y. Cent. R. Co. v. Stoneman*, 233 Mass. 258, 123 N. E. 679 (1919); *Williams v. Lowe*, 79 N. J. Eq. 173, 81 Atl. 760 (1911). See additional cases of specific performance of affirmative contracts involving much detail and extensive periods of time in performance where damages would be inadequate, cited and discussed in WALSH, *op. cit. supra* note 1, at 327-335, and notes.

¹⁵⁶ *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498 (1890); *Richmond v. Robinson*, 12 Mich. 193 (1864); *Edgerton v. Peckham*, 11 Paige 352 (N. Y. 1844) and other cases cited in WALSH, *op. cit. supra* note 1, at 374, 375, and modern English cases holding *contra* as to the right of specific performance, losing sight of the principle involved and established in earlier cases. See also California and Kansas cases, *contra*, there cited.

¹⁵⁷ *Id.* at 362-367; 2 WILLISTON, *op. cit. supra* note 147, at §§ 841-843.

¹⁵⁸ LANDELL, *A BRIEF SURVEY OF EQUITY JURISDICTION* (2d ed. 1905) 58-61 *et. seq.*

¹⁵⁹ Under statutes giving equity power by decree to transfer title *in rem*, now practically universal in England and the United States, service by publication on an absent defendant in an action of specific performance is valid, establishing the nature of the action to be as above stated. *Garfein v. McInnis*, 248 N. Y. 261, 162 N. E. 73 (1928). See cases cited in WALSH, *op. cit. supra* note 1, at 50-53, nn. 14-27.

¹⁶⁰ *Paine v. Meller*, 6 Ves. 349, 31 Eng. Rep. 1088 (1801); *Sewell v. Underhill*, 197 N. Y. 158, 90 N. E. 430 (1910), and other cases cited in WALSH, *op. cit. supra* note 1, at 444-445, n. 76.

¹⁶¹ *Libman v. Levenson*, 236 Mass. 221, 128 N. E. 13 (1920); *Wilson v. Clark*, 60 N. H. 352 (1880), and other cases cited in WALSH, *op. cit. supra* note 1, at 445, n. 77.

¹⁶² See Professor Williston's discussion of the practical advantages of the minority rule, 2 WILLISTON, *CONTRACTS* (1920) § 942. On this question generally see WALSH, *op. cit. supra* note 1, at 438-454; CHAFFEE AND SIMPSON, *op. cit. supra* note 146, at 955-976.

¹⁶³ In support of the theory that risk of loss should accompany the possession in these cases, see Williston, *The Risk of Loss after an Executory Contract of Sale in the Common Law* (1895) 9 HARV. L. REV. 109. *Contra*, Pound, *Progress of the Law* (1920) 33 HARV. L. REV. 826, n. 68; Keener, *Burden of Loss as an Incident of the Right to Specific Performance* (1901) 1 COL. L. REV. 1. See also, Stone, *Equitable Conversion*

by Contract (1913) 13 COL. L. REV. 369, 386 *et seq.*; WALSH, *op. cit. supra* note 1, at 446-447; 1 CHAFEE AND SIMPSON, *op. cit. supra* note 146, at 955-957.

¹⁶⁴ Millville Aerie etc. Frat. Order of Eagles v. Weatherby, 82 N. J. Eq. 455, 88 Ad. 847 (1913); note by Professor Vance; Note (1924) 34 YALE L. J. 87, citing American cases as establishing this rule as the prevailing American doctrine. The opposing rule of Raynor v. Preston, 18 Ch. D. 1 (1881), was changed by statute, 12 and 13 GEO. V. c. 16, § 105 (1922) providing for recovery of the insurance money by the purchaser from the vendor. To the same effect, LAW OF PROPERTY ACT (1925), GEO. V. c. 20, § 47. See WALSH, *op. cit. supra* note 1, at 451-454.

¹⁶⁵ Raynor v. Preston, note 164, *supra*; Brownell v. Board of Education, 239 N.Y. 369, 146 N. E. 630 (1925) (strong dictum) and other cases cited, 1 CHAFEE AND SIMPSON, *op. cit. supra* note 146, at 970-971, n. 2, citing also cases for the prevailing American rule; Pound, *supra* note 163, at 813, 829, n. 78. See UNIFORM PURCHASERS AND VENDORS RISK ACT adopted by the Commission on Uniform State Laws in 1935, Report for 1935, § 39, enacted in New York Laws, 1936, cc. 731, *am'* N. Y. REAL PROP. LAW by adding a new section, § 240a, modifying the prevailing rule by the provision that the risk of loss shall fall on the purchaser in these cases only where the legal title or the possession has passed to the purchaser.

¹⁶⁶ Castelain v. Preston, 11 Q. B. Div. 380 (1882).

¹⁶⁷ Tulk v. Moxhay, 2 Phillips 774, 41 Eng. Rep. 1143 (1848), and other cases cited in WALSH, *op. cit. supra* note 1, at 458-460. See *id.* at 455-458 for a treatment of the principles involved.

¹⁶⁸ *In re Nisbet and Potts Contract*, [1906] 1 Ch. 386, 409; Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917), and other cases cited in WALSH, *op. cit. supra* note 1, at 462-468.

¹⁶⁹ Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Trustees of Columbia College v. Thatcher, 87 N. Y. 311 (1882), and other cases cited in WALSH, *op. cit. supra* note 1, at 467; CHAFEE AND SIMPSON, *op. cit. supra* note 146, at 844-864. The restriction was removed as a cloud in McArthur v. Hood, 221 Mass. 372, 109 N. E. 162 (1915). In Welitoff v. Kohl, 105 N. J. Eq. 181, 147 Atl. 390 (1929) a declaratory judgment that the restriction was unenforceable was not conditioned on payment of damages, while in Lacov v. Ocean Ave. Bld. Corp., 257 N. Y. 362, 178 N. E. 559 (1931), a similar declaratory judgment was conditioned on payment of damages to the owner of the property benefited. In Bull v. Burton, 227 N. Y. 101, 124 N. E. 111 (1919), specific performance of a contract to purchase was refused because of defective title arising out of restrictions no longer of any value because of changed conditions of the neighborhood, the court holding that though the restrictions would not be enforced specifically in equity, the purchaser could not be compelled to accept title, which was subject to an action for damages in case of a breach of the restrictions. See additional cases sustaining the McArthur case, 1 CHAFEE AND SIMPSON, *op. cit. supra* note 146, at 857, n. 2.

¹⁷⁰ See cases in preceding note, also criticism of Bull v. Burton, note 169, *supra*, by Dean Pound in *Progress of the Law—Equity* (1920) 33 HARV. L. REV. 813, 820-821. He said: "It is submitted that the sound course is to hold that when the purpose of the restrictions can no longer be carried out the servitude comes to an end . . . There is then nothing left to protect by injunction and nothing for which to award damages."

¹⁷¹ Northwestern Univ. v. Wesley Memorial Hosp., 290 Ill. 205, 125 N. E. 13 (1919); Van Vliet and Place, Inc. v. Gaines, 249 N. Y. 106, 162 N. E. 600 (1928).

¹⁷² See Bull v. Burton 227 N. Y. 101, 124 N. E. 111 (1919) and Lacov v. Ocean Ave. Bid. Assn. 257 N. Y. 362, 178 N. E. 559 (1931).

¹⁷³ Lettau v. Ellis, 122 Cal. App. 584 (1932). See, probably *contra*, Van Vliet and Place Co. v. Gaines, 249 N. Y. 106, 162 N. E. 600 (1928), holding that a condition against nuisances made the title unmarketable though such nuisances were forbidden by ordinance, making the condition of little if any value, as a breach was very improbable and could be prevented without forfeiture under the condition. Where the neighborhood becomes so established by ordinances forbidding nuisances and uses in violation of zoning regulations that such restrictions are no longer needed to protect the property, they should be discarded as merely technical and superfluous interference with alienation. See WALSH, *FUTURE ESTATES IN NEW YORK* (1931) 227-230, on this question and on suggested statutory change, also Walsh, *Conditional Estates and Covenants Running with the Land* (1937) 14 N. Y. U. Law Quarterly Rev. 162, 190-194.

¹⁷⁴ See notes 5 to 9, and text, *supra*.

¹⁷⁵ WALSH, *op. cit. supra* note 1, at 498-500, and cases cited.

¹⁷⁶ *Id.* at 493, 494.

¹⁷⁷ *Id.* at 495-496.

¹⁷⁸ *Id.* at 509-510. A mistake should not mislead appears in comparing Hodgins v. Jennings, 148 App. Div. 879, 133 N. Y. Supp. 584 (1913), where *scienter* was required as an element of fraud in a case of rescission "at law," with Canadian Agency v. Assets Realization Co., 165 App. Div. 96, 150 N. Y. Supp. 758 (1914), holding that *scienter* was not necessary in a case of equitable rescission. As the court in every such case in code states is a court of both law and equity, and law and equity are merged, two conflicting doctrines of rescission are unthinkable.

¹⁷⁹ See cases cited in WALSH, *op. cit. supra* note 1, at 519 n. 18.

¹⁸⁰ Snell v. Atl. F. & M. Ins. Co., 98 U. S. 85 (1878).

¹⁸¹ See WALSH, *op. cit. supra* note 1, at 481-485.

¹⁸² These cases are cited and discussed in WALSH, *op. cit. supra* note 1, at 530-533.

¹⁸³ See *id.* at 541-546.

¹⁸⁴ *Id.* at 546, *et seq.*

¹⁸⁵ Porten v. Peterson, 139 Minn. 152, 166 N. W. 183 (1918), and cases cited therein, including case of declaring void an antenuptial agreement to protect inchoate dower of plaintiff.

¹⁸⁶ A suit in equity to establish the existence of an equitable lien so as to make it a matter of record prevents the destruction of it by a conveyance of the legal title to a purchaser for value without notice. Such cases are common.

¹⁸⁷ Bankers' Security Co. v. Meyer, 205 N. Y. 219, 98 N. E. 399 (1912), and cases cited therein.

¹⁸⁸ N. Y. CIV. PRAC. ACT., § 473. For a list of the states in which this statute has been adopted, see (1930) 43 HARV. L. REV. 1290. See Faulkner v. City of Keene, 85 N. H. 147, 135 Atl. 195 (1931), and cases therein cited and discussed; Borchard, *The Declaratory Judgment* (1918) 28 YALE L. J. 1, 105.

THE LAW OF ESTATES SINCE BUTLER AND KENT

RUSSELL DENISON NILES

I

IN 1835, Benjamin F. Butler,¹ having recently completed his collaboration on the revision of the New York statutes,² founded the New York University School of Law.³ It was then only five years since Kent had published the final volume of his *Commentaries on American Law*.⁴ For a study of the American law of property, this date is a convenient starting point. Now, a century later, with the renewed activity of law-revision commissions⁵ and with the appearance of the early drafts of the *Restatement of the Law of Property* by the American Law Institute,⁶ there are both means and incentive to study the development of the law of property during this period.

It is also a hundred years since the death of Jeremy Bentham,⁷ but it is still an open question whether reform in the law of property can best be accomplished by adopting a comprehensive code, by passing statutes of narrow scope to purge the law gradually of anachronisms, or by relying on the gradual evolution of judge-made law, guided by the criticism and restatement of the scholars. The debate⁸ often centers on the success or failure of the most conspicuous attempt at a systematic revision: the New York Revised Statutes of 1830.⁹

This paper will be restricted to the law of estates. A series of topics will be examined to determine how far the American law has progressed from the medieval law of estates which Kent expounded in his *Commentaries* and which Butler and his associates attempted to modernize in their pioneer code. The purpose will

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be not only to summarize the accomplishment to date, but to suggest on what lines the next advance will proceed. Special attention will be paid to the relative success of the various methods of reform, since there is more disagreement today about methods than about objectives.

II

At the beginning of our period, feudal tenure was completely gone and ownership in fee-simple, in spite of the feudal connotation of the phrase, was allodial.²⁰ But the law of property retained many evidences of its medieval origin. The ancient rule, for example, that a conveyance would transfer the fee-simple only if the word *heirs* was used, was still law in England and, generally, in the United States.²¹ Already, however, there was demand for relief from the strict formalism of the law of property.²² If *A* conveyed to *B* "absolutely," or "forever," or to *B* and "his successors and assigns,"²³ it seemed to practical men that a fee should pass. As one judge said:

"Such a rule must appear to the intelligent layman, unfamiliar with the mysteries of the fossil remains of feudal institutions, as arbitrary, destructive, tyrannical, and in most violent conflict with all ideas of legal reason which such a person can comprehend."²⁴

Even though Kent realized that the rule had outlived the original reason for its existence, he was reluctant to see a change. He said, in answer to an English barrister²⁵ who suggested a reform code:

"... But I think it very probable that the abolition of the rule requiring the word *heirs*, to pass a fee by deed, will engender litigation. There was none under the operation of the rule. The intention of the grantor was never defeated by the application of it. He always used it when he intended a fee. Technical and artificial rules of long standing, and hoary with age, conduce exceedingly to certainty and fixedness in the

law, and are infinitely preferable on that account to rules subject to be bent every day by loose latitudinary reasoning. A lawyer always speaks with confidence on questions of right under a deed, and generally circumspectly as to questions of right under a will."²⁶

The controversy about the continued need of the word "heirs" in a deed involved a more profound issue than was apparent to the layman. The question involved a fundamental attitude toward property law. There had been built up through the centuries a grand, logical system of property law. It was better suited to feudal England than to pioneer, democratic America, but it was, nevertheless, settled and definite, and it had been systematized and expounded by the "sages of the law."

"I am utterly unprepared," wrote a New Jersey judge,²⁷ "to overturn the common law, as understood by Littleton, Coke, Shepherd, Cruise, Blackstone, Kent, and all the judges who have administered it for three centuries, and to adopt the dogma that intention, not expression, is hereafter to be the guide in the construction of deeds."

The judge was not being merely loyal to the past; he was according to his light being sternly pragmatic:

"And the reason wherefore the law is so precise to prescribe certain words to create an estate of inheritance is for avoiding uncertainty, the mother of contention and confusion."²⁸

It is extraordinary that judicial authority should be almost entirely in support of the rule. Only in Hawaii²⁹ and in New Hampshire³⁰ have the courts succeeded in breaking definitely with the past without a statute.³¹ In spite of the fact that reform statutes were passed early in the century and have continued to be enacted throughout these years,³² there have been, in thirteen jurisdictions, cases sustaining the common-law rule.³³

However, if courts have been bound by the tradition that prop-

erty law must be certain at all costs, legislatures have taken a different point of view. Six states had relaxed the rule by the time of Kent.²⁴ By the time of Stimson, express statutes made it possible to convey a fee-simple without the magical word "heirs" in at least twenty-eight states.²⁵ Reform has continued with some statutes passed at surprisingly late dates: Massachusetts in 1912,²⁶ Ohio in 1925,²⁷ Rhode Island in 1927.²⁸ At present the common-law rule has been changed by statute in all jurisdictions except seven.²⁹ In one of these the rule never existed; in another it was abrogated by decision.³⁰ The prevailing statutes not only permit the creation of a fee without words of inheritance but presume that the grantor or testator intended to transfer a fee unless he uses express words restricting the estate.³¹

The remarkable part of the story is not that the legislatures have been so consistently hostile to this feudal rule but that the courts have been so loyal to it. As suggested, only in Hawaii and New Hampshire have the courts definitely broken away without a statute, although there are a few other cases that tend in that direction. Even in the twentieth century, well over a hundred years after the first reform statutes, there have been at least a half-dozen decisions adhering to the common-law rule.³²

III

Legal life-estates, except those arising out of the marriage relation, seem never to have been common in America. The tradition has always been for parents to leave property to children in fee rather than for life. The statutes that have established a presumption in favor of the creation of a fee-simple have further restricted the number of life-estates.³³ And in recent years donors have shown an increasing preference for a trust instead of a legal life-estate as a base for future interests.³⁴

The paucity of decisions on legal life-estates has forced the reporter of the Restatement to turn to the law of trusts for analogies.³⁵ If this "reportorial legislation" is accepted as the American law, it may well be that our freedom from precedents will have permitted us to establish a more modern and scientific body of law than would have been evolved by the law side of the court.³⁶

For the purposes of this study, the marital life-estates are the most interesting. Dower and curtesy are feudal relics.³⁷ In Kent's day the nation was still chiefly rural and agricultural, and, therefore, there may have been some practical justification for preserving these medieval institutions. But changed conditions have long demanded reform.

The married women's acts, passed about the middle of the nineteenth century, ended the estate by the marital right in all states.³⁸ Vermont abolished curtesy as early as 1787,³⁹ but generally reform came late in the century.⁴⁰ In some important jurisdictions reform is very recent, as in Pennsylvania in 1917,⁴¹ in New York in 1929,⁴² and in New Hampshire in 1933.⁴³ Common-law curtesy still exists in six jurisdictions,⁴⁴ and in a modified form in six others.⁴⁵

Dower has been a favorite of the law. Much judicial rhetoric has been composed in its defense.⁴⁶ But inchoate dower was recognized by Kent as "a severe dormant encumbrance upon the use and circulation of real property."⁴⁷ Even in Kent's time, the inchoate feature of dower had been abolished by statute in five states,⁴⁸ and it has become increasingly clear that land is fettered for no good purpose, for seldom would a life-estate in one third of a husband's real property be equivalent to a fair outright share of his whole estate.⁴⁹ But the resistance to the abolition of dower has been great. Inchoate dower was abolished in England in

1835,⁵⁰ but in America the reform statutes are mostly very recent.⁵¹ Dower still exists substantially on its common-law basis in nearly half of the states.⁵²

The courts have remained loyal to dower and curtesy even to the point of recognizing all of their technical common-law characteristics.⁵³ There has not been even a substantial relaxation of the ancient requirement of seisin.⁵⁴

IV

At the common law the word "heirs" had so specialized a use as a word of limitation that a conveyance to *A* for life with remainder to his heirs gave *A* a fee-simple.⁵⁵ This, the rule in *Shelley's Case*, is shocking to a layman because he sees that the intention of the grantor or testator is being thwarted. But to the lawyer who has mastered the common-law system, who has come under the spell of Blackstone and Fearn, and who knows the implications of taking by descent instead of by purchase, the rule seems to have a strange fascination. It is all of a piece with the requirement of the word "heirs" as a word of art in creating a fee-simple,⁵⁶ and with the rule that a grantor could not convey a remainder to his own heirs.⁵⁷ Even Kent, for instance, was skeptical about the wisdom of the New York Act of 1830, which had abolished the rule in *Shelley's Case*.⁵⁸ The revisers had thought the rule to be purely arbitrary and calculated to defeat the intentions of those who were ignorant of technical language.⁵⁹ Perhaps Kent foresaw the dilemma of *Moore v. Littel*⁶⁰ and the confusion and the uncertainty which have resulted from using the word "heirs" as a word of purchase.⁶¹

The rule in *Shelley's Case* was early accepted in almost all of the older states. By the beginning of our period, judicial recognition had been given it in Pennsylvania (1795), New York (1801), Virginia (1794), South Carolina (1795), Connecticut

(1804), New Jersey (1818), Ohio (1832), and Tennessee (1836).⁶² Nor was there always mere submission to authority; spirited defenses of the rule are found in some of these early cases.⁶³ Perhaps the best statement of the view held by many able lawyers is the opinion of Chief Justice Gibson in *Hileman v. Bouslough*.⁶⁴

There has been much speculation by scholars concerning the reasons for the rule.⁶⁵ The classical view is that taking by descent was favored so that the feudal lord would not lose his reliefs and his rights of wardship and marriage.⁶⁶ Williams suggested that contingent remainders were not recognized when the rule originated.⁶⁷ Another view is that under a system of primogeniture the word "heirs" must describe a succession of eldest sons, since it is plural.⁶⁸ But all of these reasons have long been obsolete, and the reason often given for continuing the rule that land is unfettered one generation earlier⁶⁹ is unconvincing because many valid future estates have the same effect upon alienation. Today text writers and commentators are unanimous in holding that the rule has long outlived the reasons for its existence and that there is neither theoretical nor practical justification for its existence.⁷⁰ But the rule still has surprising judicial support.

One of the most extraordinary things about the rule is that it is capable of stirring up such strong feeling in the partisans who attack or defend it. The famous controversy that divided the English bar during the prolonged litigation in *Perrin v. Blake*⁷¹ is hardly more remarkable than the contest over the same issue in some of our states more than a century later. The majority and dissenting opinions in *Doyle v. Andis*⁷² illustrate the heat and light sometimes involved.

Whatever nostalgic feelings lawyers have had for the system expounded by the "sages of the law,"⁷³ whatever justification, real or fancied, judges may have seen for the rule, legislators

have been of a different mind. Very early they expressed their hostility to the rule. Five states had enacted statutes tending to restrict or abolish it⁷⁴ before the New York Statute of 1830 abolished it completely.⁷⁵ Many states followed the New York lead, especially during the next two decades. Stimson listed twenty-two states having such statutes by 1886.⁷⁶ There are at least thirty-three such statutes today.⁷⁷

While it is understandable that courts in a given state would not feel free to abolish the rule in *Shelley's Case* after they had recognized it as a rule of property, it is surprising to find them strictly and unsympathetically construing statutes directed against the rule. True, many of the statutes were badly drafted, but in their construction there is dramatic proof of the unsoundness of the tradition of construing strictly statutes which are in derogation of the common law.⁷⁸

The old New Jersey statute provided that if land were devised to any person for life, and at his death to his heirs, issue, or heirs of his body, then after the death of such devisee for life the land should go to his children or their issue.⁷⁹ The New Jersey courts have held, however, that if the devisee for life has no issue, the rule in *Shelley's Case* still operates.⁸⁰ The Kansas statute, also restricted to wills, reads: "When lands . . . are given by will to any person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such part taken, and a remainder in fee simple to his heirs."⁸¹ The Kansas courts have, nevertheless, held that a gift to A for life, remainder to the heirs of his body, gives A a fee-tail under the rule in *Shelley's Case*.⁸² The most extreme case is probably the one under the West Virginia statute.⁸³

This statute, like the earlier one in Virginia and similar to the one in Massachusetts, read: "Where any estate, real or personal, is given by deed or will to any person for his life, and after his

death to his heirs, or the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body."⁸⁴ This statute was not open to the objections of the New Jersey or Kansas statutes, but Minor had suggested that it might be subject to three exceptions: it might not apply where the conveyance was for value (the word used was "given"), where the first estate was *pur autre vie*, or where the remainder was mediately and not immediately limited after the first estate.⁸⁵ The West Virginia court actually held that the rule in *Shelley's Case* still applied to a conveyance to A and B for their joint lives, with the right of survivorship, remainder in fee to their heirs, on the basis of Minor's second criticism.⁸⁶ In several other states statutes directed against the rule have been unsympathetically dealt with.⁸⁷ It should be noted that in this way good statutes finally evolve and a tradition of scientific draftsmanship is encouraged. The new statutes in West Virginia⁸⁸ and New Jersey⁸⁹ are models worthy of imitation.

The rule is far from being a dead letter. Simes lists ten states in which the rule has present judicial recognition.⁹⁰ In three the question is open.⁹¹ Even in the thirty-three states that have statutes the rule is not dead, because some statutes are limited only to wills, others to deeds, only a few apply to personal property, and many are vulnerable to hostile interpretation.⁹² As a rough guess, the rule may yet incite litigation in half of our jurisdictions.

V

The fee-tail was brought to the Colonies as a part of the heritage of the common law.⁹³ Since the fee-tail, like primogeniture, was useful chiefly in preserving a landed aristocracy, it had little to commend it to the colonists generally.⁹⁴ Where primogeniture had obtained a foothold in America, it was, responsive to the at-

tack of men like Jefferson,⁹⁵ ended by statutes enacted in the period between 1777 and 1798.⁹⁶ During the same period an offensive against the fee-tail resulted in statutes abolishing this estate in most of those jurisdictions⁹⁷ and in several others where primogeniture had never prevailed.⁹⁸ In all of these states, except Connecticut⁹⁹ and New Jersey,¹⁰⁰ the statute changed the fee-tail into a fee-simple.¹⁰¹ During the first third of the nineteenth century a number of other states passed statutes, but instead of following the prevailing pattern they copied the statutes giving the first taker a life-estate with a remainder in fee to those next entitled.¹⁰² When Kent's *Commentaries* were published, there had been statutory reform in at least thirteen states;¹⁰³ the fee-tail was not recognized by the courts of three other states,¹⁰⁴ but it was still recognized in seven states.¹⁰⁵

At the time of Stimson, fees-tail were good only in Massachusetts, Maine, Rhode Island, Pennsylvania, Maryland, and Delaware.¹⁰⁶ The legislatures of most of the other states had passed reform statutes.¹⁰⁷ A few, such as Arkansas and Colorado,¹⁰⁸ accepted the New Jersey pattern, which probably came to their attention through Illinois and Missouri,¹⁰⁹ but most of the newer states followed the earlier statutes changing the fee-tail into a fee-simple.¹¹⁰

Thus the opposition to the fee-tail, which caused the first statutes to be passed at the time of the Revolution, has continued, but the resulting statutes are widely dissimilar. The substitution of a fee-simple for a fee-tail, which was the pattern in the earliest statutes, is definitely the prevailing one today. At least twenty-four jurisdictions have such statutes.¹¹¹ There has been but one new statute in the last half century which has adopted the life-estate-and-fee-in-remainder pattern,¹¹² and in at least one prominent state such a statute has been repealed in favor of the more prevalent one.¹¹³

The most interesting part of the story of the fee-tail in America is the attitude of the courts in the absence of explicit statutes.

There has been a surprising amount of litigation in Hawaii,¹⁷⁴ where the courts have, naturally enough, held the fee-tail unsuited to conditions in that territory and have substituted either a fee-simple or a life-estate and remainder, according to the testator's probable intent. In two states without express statutes, the courts have held that the fee-tail becomes a fee-simple.¹⁷⁵ These decisions are, of course, commendable. The fee-tail today has no serious support.

Especially dramatic has been the experience of a few states which have held the statute *De Donis* not in force. In South Carolina, where a statute expressly reenacted such of the English statutes as were deemed desirable and significantly omitted the statute *De Donis*, the courts early held and have often reaffirmed that the fee conditional, obsolete in England after 1285, existed with its common-law characteristics.¹⁷⁶

In Iowa, in 1882, without such a general statute, it was held that the English statute *De Donis* had been enacted to place restraints upon alienation and to create perpetuities for the purpose of maintaining a landed aristocracy, and that it was thus entirely foreign to the genius and policy of American institutions.¹⁷⁷ Thus the power to convey a fee-simple after birth of issue was established, but at the cost of exhuming an estate that had been dormant for over five centuries. But there are dangers in reviving forgotten learning.

On the death of the donee in fee conditional, leaving needy collateral relatives but no lineal descendants, the land reverted to the donor.¹⁷⁸ Likewise, the fee conditional could not be devised. If the court had the courage to repudiate an ancient statute generally accepted as a part of the common law, why did it not have the courage to go the whole way and substitute the fee-

simple? It is ironical that the Nebraska court as late as 1920 should, in approving the "liberality" of the Iowa decisions, have committed itself to this strange anachronism.¹²⁹ Still another state seems to follow this lead.¹²⁹

The fee-tail is still recognized in perhaps five states: Delaware, Maine, Massachusetts, Rhode Island, and Wyoming,¹³¹ but in all of them the tenant in tail has the power to make a disentailing conveyance.¹³² In a few states special statutory requirements are imposed, but in none is anything like the old recovery or fine necessary.¹³³ The tenant in tail cannot even now dock the entail by will, however.¹³⁴

The fee-tail has had able defenders.¹³⁵ It was urged as a means of preserving the landed aristocracy of the South.¹³⁶ It is significant that the property-reform statutes in England—which abolished its concomitants, primogeniture and the rule in *Shelley's Case*—did not succeed in ending the deeply entrenched system of entailed estates.¹³⁷ True, greater alienability was achieved by making them equitable estates, but there was some loss of ground inasmuch as the fee-tail was extended to personal property.¹³⁸

There is one last episode of interest. Since partible descent was the tradition in the New England colonies from the beginning, there was no need for the states to abolish primogeniture by statute, as there had been in New York and the Southern states.¹³⁹ Therefore, the anachronism of primogeniture as a system of descent for entailed estates has survived in Massachusetts and Maine to this day.¹⁴⁰ And it has been suggested further that this anomaly may recur in England after the Act of 1925.¹⁴¹

VI

The significant writers on the law of estates in the period prior to Kent's *Commentaries* were not reformers. They were commentators and systematizers.¹⁴² Most of them were themselves

great conveyancers, and they had a profound respect for the technical and subtle system that was even then venerable with age. The law student of the beginning of the last century would probably start his study of property with Blackstone⁷³³ and would polish off with Fearn.⁷³⁴ Their influence was then at its height. When Kent in his *Commentaries* reached the subject of future estates, he found it necessary to expound all of the old learning about remainders and executory limitations because, as he said, except in New York, the English doctrines had not undergone any essential alterations.⁷³⁵

Still, presumably, remainders were subject to all of the technical rules implicit in the feudal concept of seisin. A freehold could not be conveyed to commence *in futuro* (except by a deed operating under the Statute of Uses);⁷³⁶ a contingent remainder was dependent on the particular estate and was thus destructible.⁷³⁷ Executory devises and springing and shifting uses were indestructible and independent of seisin, but were not favored.⁷³⁸ Still, generally, contingent future interests were inalienable by a legal conveyance.⁷³⁹ The rule against perpetuities, imperfectly understood, applied only to executory limitations.⁷⁴⁰ But reform was in the air.⁷⁴¹ Kent, who thought words of inheritance should be required in a deed,⁷⁴² who was reluctant to see the rule in *Shelley's Case* abolished,⁷⁴³ who could see utility even in the fee-tail,⁷⁴⁴ was impatient with the refined distinctions and technicalities that had developed in the long history of the law of future estates.⁷⁴⁵

Actually, there are not many early decisions supporting what text writers, even long after Kent, stated to be the general American law.⁷⁴⁶ Most citations were of English cases. The country was too new to have many wealthy families who wished to perpetuate their fortunes by family settlements or elaborate testamentary schemes.⁷⁴⁷ There were, however, enough direct adjudications⁷⁴⁸ and additional dicta⁷⁴⁹ to indicate that the English authorities

were generally thought to be binding. Although some individual judges protested eloquently against following such doctrines as that of destructibility of contingent remainders,¹⁵⁰ there was a conspicuous absence of decisions holding the formalistic English law unsuited to a new country.¹⁵¹

This was the state of affairs, with reform barely stirring in England and with only a few random statutes to ameliorate the rigid feudal principles in America, when the commissioners set out to revise the New York law of real property.

As already noted, the revisers were responsible for one of the earliest statutes making words of inheritance unnecessary in a conveyance of a fee¹⁵² and for the earliest statute completely abolishing the rule in *Shelley's Case*.¹⁵³ The fee-tail had already been abolished in New York, but it remained for the revisers to settle the troublesome question of the validity of gifts upon the first taker's "dying without issue" by the sensible presumption of definite failure of issue.¹⁵⁴ But more significant were the sections that completely assimilated the law of remainders with the law of executory limitations and purged the revised system of all unnecessary technicalities.¹⁵⁵ A future estate could commence in possession at a future date without a precedent estate.¹⁵⁶ The same law was applicable to chattels real as to real property.¹⁵⁷ A life-estate could be created in a term of years and a remainder limited thereon;¹⁵⁸ a fee could be limited on a fee;¹⁵⁹ future estates could take effect in the alternative;¹⁶⁰ the improbability of a contingency would not make the remainder void;¹⁶¹ a remainder could take effect on a contingency that would abridge or determine the precedent estate;¹⁶² a posthumous child could take by purchase;¹⁶³ the owner of a precedent estate could not defeat an expectant estate "by disseizin, forfeiture, surrender, merger or otherwise"¹⁶⁴ except where authorized by the party creating the estate;¹⁶⁵ no remainder would be defeated by the natural determination of the preced-

ent estate before the contingency was resolved;¹⁶⁶ all expectant estates were made "descendible, devisable and alienable" in the same manner as estates in possession;¹⁶⁷ and all contingent future estates were made subject to the rule against perpetuities.¹⁶⁸

Although most of the reforms were even then long overdue, it is astonishing that the revisers were able to break so completely with the past and to substitute so simple and rational a system for the ancient technicalities. The experience of other states illustrates how farsighted the revisers were. After a century of litigation and piecemeal legislation, a majority of states have only now progressed as far as New York had in 1830,¹⁶⁹ and many states have not even yet come abreast.¹⁷⁰ For instance, there has been a slow and painful struggle in other states to make future interests free from the logical consequences of the feudal concept of seisin.

Before 1830 it was generally considered that a conveyance of a freehold to commence *in futuro* was void unless the conveyance operated under the Statute of Uses.¹⁷¹ This rule was definitely established in New York.¹⁷² There were not many express adjudications in other states,¹⁷³ but the many decisions holding that a deed of bargain and sale or a covenant to stand seized was sufficient to create an estate *in futuro* suggest that the old rule had enough vitality to induce lawyers to follow the old forms.¹⁷⁴

In 1830 deeds operating under the Statute of Uses were standard. But as the century progressed, conveyancing became more informal. Most states have adopted by statute a short form deed.¹⁷⁵ These modern deeds do not depend on the Statute of Uses. They resemble more the old deed of grant than the bargain and sale. They are deeds poll and are valid without consideration recited or proved.¹⁷⁶

The question therefore arises whether or not these modern deeds are effective to create future interests, formerly good only

by way of use. The courts have been liberal in sustaining them.¹⁷⁷ Some courts have held that the feudal doctrines concerning the creation of future estates are obsolete,¹⁷⁸ and a statutory short-form deed has been held capable of creating an estate *in futuro* or a fee on a fee.¹⁷⁹ But even today, although there is practically no modern authority requiring it, the only safe conveyancing practice in many states would be to use a technical deed of bargain and sale to create a future estate which at the common law would have been known as a springing or a shifting use.¹⁸⁰

If a legal estate may be conveyed *in futuro* by a deed which does not operate under the Statute of Uses, then there is no reason for continuing to hold that a contingent remainder fails if the particular estate is terminated or expires before the contingency is resolved.¹⁸¹ Since the doctrine of destructibility defeats the intention of the donor and confiscates the estate of the donee, it would seem supportable only if some strong social policy were served.¹⁸² It is true that the doctrine of destructibility makes land alienable one generation earlier,¹⁸³ and this might be reason enough if the rule against perpetuities had not been formulated on its modern basis.¹⁸⁴ But since a trained conveyancer could, by an executory limitation, or by providing for a trustee to preserve contingent remainders,¹⁸⁵ avoid the rule of destructibility, the rule remains only to trap those who think that a rule should cease after the reason for it has ceased.

The rule has, nevertheless, had an amazing vitality. The first reform statute in England became effective in 1845,¹⁸⁶ but the doctrine was not completely abolished until 1877.¹⁸⁷ In America the doctrine of destructibility was generally recognized in the older states.¹⁸⁸ Tortious feoffment was probably never of importance as a means of destruction in America, although a few states have expressly abolished the practice by statute.¹⁸⁹ In several states the *fine*¹⁹⁰ and the common recovery¹⁹¹ were recognized,

but they were more often used to dock an entail than to destroy a contingent remainder.¹⁹² The chief cause of destruction has been the hypertechnical law of merger,¹⁹³ and, ironically, most of the cases have been decided in the last quarter of a century.¹⁹⁴ In at least ten jurisdictions there have been decisions more or less directly recognizing this method of destroying a contingent remainder.¹⁹⁵

In 1921, Professor Percy Boardwell made the astonishing statement that, although there were not many jurisdictions in which a contingent remainder could be destroyed by the act of the owner of the particular estate, "in the great majority of states, they will fail to take effect if the contingency on which they are to vest does not happen until after the natural termination of the particular estate."¹⁹⁶ He based his view on the fact that not many states had complete contingent remainder acts. It is true that few states have as complete statutes as the New York revisers drafted a century ago, but there has been great progress in recent years.

Even before the New York revision, a few random statutes had made a start in the direction of freeing contingent remainders from dependence on a particular estate.¹⁹⁷ A few states passed statutes soon after New York did.¹⁹⁸ Many of the Western states passed statutes soon after being admitted.¹⁹⁹ Some statutes, however, are very recent, a few after destructibility had been actively litigated.²⁰⁰

There are now statutes in nineteen states completely abolishing destructibility;²⁰¹ in five more, statutes prevent destruction by premature ending of the particular estate.²⁰² In nineteen states there are as yet no statutes or decisions.²⁰³ Only in New Hampshire²⁰⁴ and Hawaii²⁰⁵ have the courts abolished the doctrine without aid of statutes, although Kansas did so with very little aid,²⁰⁶ and decisions in a few other jurisdictions indicate that a similar result would have been reached had there been no statute.²⁰⁷ In

five states having no statutes there are square decisions recognizing destructibility,²⁰⁸ and in five other states there are dicta to the same effect.²⁰⁹ Thus in about half the jurisdictions destructibility is still a part of the American common law or at least is likely to be the subject of litigation. It is depressing to observe this state of the law a century after the New York revision.

The New York statute of 1830 made all expectant estates as fully alienable as an estate in possession.²¹⁰ This was a striking innovation.²¹¹ A vested remainder had long been alienable by grant, but a contingent remainder could have been transferred only by a release, estoppel, or equitable assignment.²¹² A Massachusetts statute made descendible contingent remainders alienable in 1835.²¹³ Reform came in England in 1845.²¹⁴ Statutes in one form or another now exist in thirty-one states,²¹⁵ but many are not as clear as the New York statute and would not be sufficient without a liberal construction.²¹⁶ However strict the courts usually are in construing statutes in derogation of the common law, they seem to favor a construction that will permit the free alienation of property.²¹⁷ In a few states alienability has been attained without a statute.²¹⁸ Indeed, there seems to be no reasonable argument against free alienability. There is no longer a fear of champerty and maintenance,²¹⁹ and a contingent remainder is now recognized as something more than a "mere possibility."

But however desirable the change, the ancient authority relaxes its hold slowly. Thus in six states there are decisions, which have not been overruled, holding that contingent future estates are inalienable, and some of the cases are quite recent.²²⁰ If the contingency is as to the person and not as to the event, it is the law by statute in one prominent jurisdiction that the estate is inalienable,²²¹ and dicta in other states are in accord.²²² Occasionally the old law is read back into a statute,²²³ and although alienable interests generally may be reached by creditors, the courts have not

always permitted contingent future interests to be sold in execution of a judgment even where voluntary alienation is allowed.²²⁴

Although great progress has been made toward making all future interests alienable, in few states is the law as clear and simple as it was made in New York in 1830.

When the New York revisers confined their attentions to simplifying the law of future estates and liberating it from the tyranny of medieval formalism, they anticipated by a century what is coming to be the modern American law. But their attempt to set up a detailed substitute for the rule against perpetuities was not so successful. In fact, it has been this part of the revision that has discredited general codes in the opinion of some of our most influential writers.²²⁵

The scheme of the revisers varied from what has been established as the rule against remoteness of vesting.²²⁶ The general test was stated in terms of suspension of the absolute power of alienation instead of remoteness of vesting;²²⁷ the measuring lives were restricted to two;²²⁸ and the twenty-one-year period in gross was not allowed.²²⁹

It is hardly necessary to come to the defense of the revisers, but it is interesting to determine why they, otherwise so successful, have failed in this particular.

First of all it should be recalled that in 1830 the rule against perpetuities was in a formative stage in England. None of the specialized treatises had yet appeared.²³⁰ The great writers and conveyancers of the day were divided on the true purpose and form of the rule.²³¹ A perpetuity was abhorred long before it was defined. Further, it was not until 1833 that the twenty-one-year period, not identified with an actual minority, was authoritatively decided to be a part of the period allowed in England.²³² But it was not ignorance of the common law that caused the New York

revisers to draft the sections as they did. They intended an innovation.²³³ They were impatient with the law as it existed in England. There had lately been before the English courts two cases that showed dramatically the abuse to which the common-law rule of unlimited lives and an absolute term of years was subject. One case, *Thellusson v. Woodford*, permitted an eccentric gentleman to disinherit his family for the lives of all of his descendants then alive so that his fortune of £800,000 would accumulate into one of the greatest fortunes of history.²³⁴ Another, finally decided as *Cadell v. Palmer*,²³⁵ permitted twenty-eight lives (twenty-one of them being strangers) to measure, plus twenty-one years as an absolute term. The first case caused agitation which resulted in the reform statute known as the Thellusson Act,²³⁶ rigidly restricting accumulations.

In 1827 an English barrister, James Humphreys, published the second edition of a book on real property²³⁷ which contained an outline for systematic reform. The New York revisers were much influenced by this book, as they were careful to acknowledge; indeed, some of the sections of the New York statutes were taken almost verbatim from Humphreys's proposed code.²³⁸

Humphreys thought that the Thellusson Act suggested a model for a general rule against perpetuities.²³⁹ He approved of restricting inalienable gifts to the lives or minorities of actual donees, and not of allowing them to be measured by any number of lives in being, plus an absolute period of years.²⁴⁰ The "term of procrastination" under the common law was too extended. He said:

"... It is often urged that all the candles are burning at the same time. Luminous as may be the illustration, it is somewhat defective in exactness: Candles are usually of equal length—but among a number of lives selected a few will probably far outlive the ordinary period of mortality."²⁴¹

Humphreys seemed to view the rule against perpetuities as one directed against the "suspense of alienation";²⁴² but he also spoke of "all dispositions to take place . . . beyond the period within which the same are confined" as being "utterly void."²⁴³ As a matter of fact, his code restricted future gifts so rigidly that the permitted patterns would satisfy either rule.

The New York revisers reacted quite as violently to the Thellusson and Bengough wills as had Humphreys,²⁴⁴ but they were disposed to allow a more flexible system of future estates. They hit upon the two-lives rule as a compromise, apparently, and did not prevent the two lives selected from being strangers to the gift.²⁴⁵ Basically, they adopted the rule against undue suspension of alienation, but in two special patterns they expressly provided against remoteness of vesting.²⁴⁶ It was a hybrid system—neither the common law nor Humphreys's. It was neither time-tested nor well thought out. The revisers felt strongly against an evil, but their scheme of reform was not simple, self-consistent, nor practical, and it has caused a vast amount of litigation.²⁴⁷

The New York courts have made a bad matter worse. They have treated the statutory provisions as if they were principles of the common law.²⁴⁸ This has involved two unfortunate consequences: the courts have given the experimental innovation of the revisers the reverence deserved only by venerable principles,²⁴⁹ and, secondly, they have extended and developed the statutory scheme as though they were dealing with principles in a formative stage.²⁵⁰ The statutory provisions as drafted were stringent and difficult to apply, but the statutes encrusted with a century of decisions are more stringent and more incomprehensible.²⁵¹ The courts, by attempting to patch up and defend the existing law,²⁵² have perpetuated a blunder that should have been corrected by an amendment soon after the revision.²⁵³

The New York experience shows dramatically the advantages

and the risks in a general revision. But in spite of the ill-fated perpetuity sections (which cast more discredit on those who have resisted an amendment²⁵⁴ than on the revisers), the experience of the century preponderates in favor of this method of reform.

VII

It apparently did not occur to the revisers in New York to group the right of entry for condition broken with other future interests. Had the right of entry (or the power of termination, as it is called in the Restatement)²⁵⁵ developed as did powers of revocation and appointment in connection with the law of uses, it would probably have been assimilated by now with the modern law of executory interests, and hence would be alienable and subject to the rule against perpetuities.²⁵⁶

The right of entry, however, developed separately.²⁵⁷ The condition subsequent was a primitive device, and was anciently used to accomplish many collateral purposes.²⁵⁸ The object of the grantor might have been to enable himself to retake the property upon a contingency, but more often it was to enable himself, by the threat of forfeiture, to coerce the grantee into complying with his wishes. Thus a grantor might force the grantee to pay rent, to repay a loan, to pursue a course of personal conduct, or to use property for a special or restricted purpose.

It has long been clear that the condition subsequent, when used for its *in terrorem*²⁵⁹ effect, should not be favored. Forfeiture is harsh and antisocial. Besides, a grantor or testator may now accomplish his design (in so far as it is socially desirable that he should) by a full range of modern devices.

The charitable trust is generally preferable to a conveyance on condition that the property be used for charitable purposes.²⁶⁰ The grantee on condition, unlike a trustee or covenantor, is under no duty to perform. He is neither liable to damages nor to an in-

junction. The grantor's only remedy is forfeiture, a remedy which may be too severe for his purposes.²⁶²

The modern equitable servitude or covenant running with the land is vastly superior to the condition subsequent when used to restrict the use of land²⁶²—except, possibly, for the grantor. The common-law characteristics of the right of entry are out of harmony with many modern principles. For instance, the condition is valid after it is stale, after the neighborhood has changed, and even after performance of the condition has ceased to be of value to the grantor.²⁶³ The right of entry is often available to one who is not the real party in interest;²⁶⁴ indeed, it is often impossible to transfer the right of entry to the only person who is substantially interested in the performance of the condition.²⁶⁵ The condition may exist for generations as a clog on alienation.²⁶⁶

It is true that a right of entry, when used to secure the payment of rent, may be transferred with the reversion so as to be available to the real party in interest, but a statute was necessary to bring about this result.²⁶⁷ The condition subsequent is most defensible when used as a means of recovering the premises from a defaulting tenant, but even here the summary proceedings provided by modern statutes are superior to either forceful entry or ejectment, and are not dependent on conditions.²⁶⁸

If the right of entry is used primarily as a future contingent interest in the grantor, then its freedom from the rule against perpetuities and its inalienability make it incongruous with the modern law of future estates.²⁶⁹

But it is not necessary to make a case against the condition subsequent. There is no disagreement. Equity has always abhorred a forfeiture,²⁷⁰ and even the law courts give effect to a defeasance clause with great reluctance.²⁷¹ What, then, has been done in the last century to curtail or abolish the use of the condition subsequent in conveyances of land?

The story is interesting because the law courts have been left to their own devices. The courts of equity have relieved against forfeiture in a few patterns,²⁷² but generally they have contented themselves with a strict hands-off policy. And, oddly enough, there has been almost no relief through legislation. The revisers may have intended to make rights of entry alienable under their blanket provision,²⁷³ but there is no evidence that they wished to subject them to the rule against perpetuities. And, since then, the entire crop of statutes seems to consist of five which expressly make rights of entry alienable²⁷⁴ and one statute which limits the right of entry to thirty years after the creation of the estate.²⁷⁵ In England, after rights of entry had been made alienable by statute,²⁷⁶ the courts, without a statute, extended the rule against perpetuities to include them.²⁷⁷ In America the courts have made no bold or imaginative reform.²⁷⁸ Their method has been indirect—by means of an elaborate handicapping process.

The handicaps were high at the time of Kent. Conditions subsequent were construed strictly. Precise words of art were required in their creation.²⁷⁹ If the performance required was impossible, illegal, repugnant to the estate created, or even against public convenience, the condition was void.²⁸⁰ The right of entry was held to be "waived" even when the facts would not establish a true estoppel.²⁸¹ The right of entry could not be created in favor of a third party;²⁸² it could not be transferred (except with a reversion). And where all else failed, equity would, wherever the condition was the payment of money, generally relieve against the forfeiture.²⁸³

The courts are still carrying on their offensive along the same lines. They have extended the tests for declaring conditions void on ground of repugnance and of public policy.²⁸⁴ They have been more astute in finding the elements of waiver.²⁸⁵ Equity has ex-

tended its relief even to some cases not involving the payment of money.²⁸⁶

While the American courts have, traditionally, been liberal in making all interests in land freely alienable, they have shown slight disposition to make the right of entry alienable. Whatever the reasons were for the inalienability of rights of entry at the common law (whether the difficulty was merely conceptual or whether the rule was founded in the strong policy against maintenance),²⁸⁷ the only reason for the inalienability rule today is that it tends to defeat forfeitures.²⁸⁸ If the right of entry is not assignable or devisable but only descendible, it will often fray out in a few generations.

The reporter and advisers of the *Restatement of Property* have found only one dictum to the effect that a power of termination is alienable before breach.²⁸⁹ In only two jurisdictions are there decisions allowing alienation after breach.²⁹⁰ But in nineteen states there are express decisions against transferability before breach,²⁹¹ and, in at least ten, after breach.²⁹²

The courts have not been resourceful in making reforms, but they have been willing to keep alive archaic rules to combat forfeitures. For instance, *Dumpor's Case* was decided in 1603.²⁹³ The question was whether or not a landlord, who had made a lease on condition that the lessee or his successors would not assign without permission, lost his right of entry completely by permitting a first assignment. The decision was that he did. Although it has long been conceded that the decision was without reason,²⁹⁴ it has often been followed during the last century²⁹⁵ and even as late as 1923,²⁹⁶ presumably because the rule defeated a forfeiture. A second illustration is the rule that an attempt to transfer a right of entry results in its extinguishment.²⁹⁷ If there was ever any sound reason for this rule, which is doubtful, there is certainly no de-

fense for it today—except that it defeats a forfeiture. Indeed, in a late case the judge frankly admitted that he followed the ancient rule so that the condition would be destroyed and the estate made marketable.²⁹⁸

The courts of a few jurisdictions have established one ingenious doctrine. It is an extension of the doctrine of substantial compliance.²⁹⁹ Thus if land has been conveyed on condition that it be used for a free grammar school or for a railroad depot, the grantee, after many years of compliance, may convey the land free of the condition. This course is open to most courts.

The revisers could hardly have been expected to assimilate the right of entry for condition broken with other future interests, or to abolish the condition subsequent altogether. It has taken the great development of the law of trusts, of equitable servitudes,³⁰⁰ and the growth of the modern law of future interests to make the law of conditions subsequent seem archaic and crude. But two reforms, already accomplished in England, are long overdue. The right of entry should be made freely alienable.³⁰¹ It should be made subject to the rule against perpetuities.³⁰²

It should be noticed that subjecting the right of entry to the rule against perpetuities virtually destroys its value for the various collateral purposes for which it has been used for centuries.³⁰³ A right to reënter if the grantee opens a public house, fails to contribute to the maintenance of a park, or discontinues a free grammar school cannot easily be tied to lives. The difficulty in designating measuring lives would force grantors to use servitudes, covenants, charges, and charitable trusts. But so much the better.

VIII

The estate on special limitation, as opposed to the estate subject to a condition subsequent or to an executory limitation over, has had an interesting development during the last century. Analyti-

cally there is no essential difference between a possibility of reverter in a grantor and an executory interest in a third party.³⁰⁴ If the first estate is the same, and the contingency is the same, the two future interests are of like commercial value and have the same effect in tying up property.³⁰⁵ But they have had quite separate historical developments and today have widely divergent characteristics.³⁰⁶

In New York there has grown up a strange body of law involving what is sometimes a substantial and sometimes a mere verbal distinction between a limitation and a condition subsequent in a lease.³⁰⁷ To avoid equitable relief against forfeiture and also to avoid the delay and expense of ejectment, landlords have succeeded in drafting a clause that ends a lease by limitation and not by condition. If the tenant is in default, the landlord may give notice of his election to terminate the lease, whereupon the lease expires as if the date set in the notice were the normal date of termination. It is carefully stipulated, however, that it is the notice which causes the lease to expire and not the tenant's default.³⁰⁸ If the tenant does not leave by the day set, he may be summarily dispossessed, under the New York statute, as a holdover.³⁰⁹ As a holdover he has no defenses.³¹⁰ Thus, even though a tenant's only default is that he does not pay his rent until one day after the day set in the notice, he may lose a valuable leasehold if his landlord has used a carefully drawn clause of limitation instead of condition.³¹¹ Here are decisions that deserve the taunt that property law is largely a matter of words.³¹² Whatever turn of phrase is used, the landlord at his election is declaring a forfeiture; and the idea of forfeiture, the essence of a condition, is lacking in the true estate on limitation.³¹³ The New York Court of Appeals³¹⁴ is not yet committed to this spurious rule and it is to be hoped that it will overthrow the growing authority in its support.

Shortly before the beginning of our period, an eminent English

writer stated his view that a fee on limitation (or a determinable fee), with a possibility of reverter in the grantor, could not exist after 1290 when the statute *Quia Emptores* abolished subinfeudation.³¹⁵ Gray accepted this view³¹⁶ and some other scholars have followed him.³¹⁷ It is astonishing that from the thirteenth century to the nineteenth there should be an almost complete absence of direct adjudication.³¹⁸ The great commentators kept the old learning alive, however, and Coke³¹⁹ and Blackstone³²⁰ and Kent³²¹ gave the routine explanations and illustrations, and all assumed that a determinable fee was still part of the common law.

In the early part of the nineteenth century, as the new communities developed, there were many gifts of land for schools, churches, and civic buildings, and, later in the century, for railroad purposes.³²² The conveyances were usually by way of gift or at least were not commercial transactions. Many deeds were inexpertly drawn but they contained clauses that the grantee was to have the property for "so long as" it was used for a certain purpose, or "during" a certain use, or "until" an event occurred. Sometimes it was expressly provided that the estate should revert; sometimes that the estate should go over to a third party. Now these cases are coming before the courts—sometimes a century after the creation of the estate.³²³

The courts have not heeded the erudite academic controversy; they have followed Blackstone and Kent and have held the determinable fee valid and still clothed with its common-law characteristics.³²⁴ Since it was anciently thought that a possibility of reverter, being a reversionary interest, was vested, the rule against perpetuities has never been extended to it.³²⁵ Even where contingent remainders and executory limitations have become freely alienable, not so, necessarily, the possibility of reverter.³²⁶

An examination of the modern cases will reveal that it is often impossible to make rational distinctions between powers of termi-

nation and possibilities of reverter,³²⁷ and between possibilities of reverter and executory interests, except that the former are retained and the latter are transferred.³²⁸ And the vested quality of a possibility of reverter is illusory.³²⁹ The accident of separate historical development seems the only obstacle to a complete assimilation of possibilities of reverter and powers of termination with the modern law of future interests. The attitude taken in the *Restatement of Property* should hasten the assimilation.³³⁰

The chief point of controversy will be the rule against perpetuities.³³¹ The question is complicated by the fact that most determinable fees are given for charitable enterprises and the purpose of the rule against perpetuities in such cases is not free from doubt.³³² But if there is an evil in remotely vesting future contingent interests apart from the suspension of the absolute power of alienation, then the evil is present here as clearly as in cases of executory limitations to ascertained persons.³³³

IX

The right of survivorship as a legal incident of a joint tenancy is strictly feudal in its origin and in its reasons for existence. It is unknown in other than feudal systems of law.³³⁴ Joint tenancies were preferred at the common law, it is said, to discourage the splitting up of fiefs, or to lessen the feudal burdens of the tenants in fee.³³⁵ It has long been apparent that the *jus accrescendi* of the common law should not be favored,³³⁶ except, perhaps, when it is consciously employed by a trained conveyancer. The cases in which the heirs or devisees of a joint tenant are defeated by survivorship are very hard indeed, especially when the decedent was unaware of this strange carry-over from medieval days.³³⁷

Before Kent's *Commentaries* were published, the growing hostility to survivorship resulted, in a few states, in decisions and, in several other states, in statutes changing the common law. In

Connecticut as early as 1769 a conveyance to "Sarah and Hannah Burr, jointly" was held to give each a moiety.³³⁸ Thus the "odious and unjust doctrine of survivorship" was never known in that state.³³⁹ In Ohio since 1825³⁴⁰ it has been held that survivorship was "adverse to the understandings, habits and feelings of the people," and "utterly inconsistent with the genius and spirit of our law."³⁴¹

For the most part, however, reform has been statutory. In 1777 joint tenancy was abolished in Georgia, and all such estates, under the English law, became tenancies in common.³⁴² A number of other states shortly thereafter expressly abolished survivorship, usually by providing that, if a joint tenant died before partition, his share would pass to his heirs or devisees and not to his surviving cotenants.³⁴³ Other states passed statutes, not abolishing the joint tenancy or its chief incident, survivorship, but requiring that a deed or devise be construed to create a tenancy in common unless a joint tenancy was expressly provided for.³⁴⁴

Judges have generally remained loyal to the old learning. For instance, it was settled law at least by the time of Littleton that a joint tenancy or a tenancy by the entirety could be created only when the four unities of time, title, interest, and possession were observed.³⁴⁵ Probably this was pure conceptualism from the beginning, but it made good copy for the commentators. In 1911 the Supreme Court of Michigan had to decide whether or not a husband, who owned land in severalty, could convey an undivided one-half interest in the land to his wife, with the expressed intention of creating a tenancy by the entirety, and accomplish his purpose. The court held that at most a tenancy in common would be created, since the unities of time and title were not observed.³⁴⁶ In 1928, in Illinois, a conveyance by a wife to her husband and herself as joint tenants was also held to create a tenancy in common, although the intention to create a joint tenancy was clear.³⁴⁷

In both cases if the grantor had conveyed to a dummy, and had him convey back to the husband and wife, either a joint tenancy or a tenancy by the entirety could have been created.³⁴⁸ In New York in 1915, where a husband had conveyed to himself and his wife as tenants by the entirety, it was decided by a vote of four to three that a tenancy by the entirety resulted.³⁴⁹ But even here there was no clean break with tradition, because it was held that the husband conveyed as an individual but received an interest as part of a unity.³⁵⁰ Strict adherence to the common law would require, if *H* conveyed to *H* and *W* as joint tenants or tenants by the entirety, that *W* own all in severalty—for if a man has conveyed the whole title to himself and wife, and is unable to convey to himself, the net result would be that his wife would take all.³⁵¹ This result the Illinois court and the strong minority in New York could not approve, although the reasons for the rule they followed were equally outmoded.³⁵²

The statutes that by their terms have abolished survivorship as an incident of a joint tenancy have not always been followed by the courts. For instance, the Pennsylvania statute of 1812 provided that, on the death of a joint tenant, his moiety should not accrue to the survivors but should descend or pass by devise as if he had been a tenant in common.³⁵³ In an early case, property was devised to three brothers, *A*, *B*, and *C*, "as joint tenants, and to the survivors or survivor of them." Presumably the testator was ignorant of the statute and intended a joint tenancy. *A* died first, devising his moiety to his widow and eight children; *B* died childless; *C* survived and devised the property to *X*. It was held, in spite of the statute, that the devisees of *A* received nothing as against the devisee of *C*.³⁵⁴ The reason given was that the statute only abolished the *jus accrescendi* as a legal incident; it did not prohibit an express gift to the survivor. If there is colorable support for this case, there is less for later ones. Property was con-

veyed to *A*, *B*, *C*, and *D* "as joint tenants and not as tenants in common." *D*, the survivor, was held able, in spite of the statute, to convey a marketable title by himself.³⁵⁵

The more common cases in which the statutes abolishing survivorship have been ignored or evaded are those involving a joint bank account or a conveyance to husband and wife.

In the usual joint-bank-account cases, *A* makes a deposit in a bank in the joint names of *A* and *B*, and authorizes the bank to pay either or the survivor. One statute in a state may permit the bank to pay either and take his acquittance, even though another statute has abolished survivorship.³⁵⁶ The courts have been reluctant to forbid joint bank accounts—their social usefulness is demonstrated by their popularity. But if *A* has contributed all of the money and has died intestate, and his administrator is now claiming the fund or a share of it, how can a court, in a state where survivorship has been abolished, hold that *B* is entitled to the fund?

Some courts have answered, much as the Pennsylvania court did in the cases referred to above,³⁵⁷ that the statutes abolished the *jus accrescendi*; they did not prevent property from passing to the survivor when survivorship was expressly provided for.³⁵⁸ Some courts have said that the joint-bank-account cases are distinguishable because they are mere matters of contract.³⁵⁹ A contract there is between the depositor and the bank, but the ownership of the fund is not thereby determined.³⁶⁰ Under the same authorization to the bank, the fund may be owned all by *A*, all by *B*, owned by them jointly, or in uneven shares.

The joint-bank-account cases ought not to be controlled by the rules of the common-law joint tenancy, which have circumscribed the tenancy since the days of Littleton;³⁶¹ nor should the joint bank account be subject to the statutes which abolished survivorship because of hostility to feudal institutions. New statutes should place the joint bank account on an independent, scientific

basis. Some have been passed,³⁶³ but often the courts have had to do what they could with the old common law and the premature statutes.³⁶³

Tenancy by the entirety may be observed in the different states in all stages of preservation and disintegration.

In a few states, tenancies by the entirety fell with joint tenancies when the courts refused to recognize the feudal right of survivorship.³⁶⁴ In a few others the early reform statutes directed against joint tenancy were broad enough to include this specialized form of tenancy.³⁶⁵ In Maine, after the Married Women's Act, it was held that tenancy by the entirety did not exist; that it was repugnant to American ideas about the rights of married women; that the estate never rested upon a rational or substantial groundwork; that it was feudal in origin; and that its reason for existence had disappeared centuries ago.³⁶⁶ Several of the newer states have held that tenancy by the entirety is no part of their law.³⁶⁷ In Nebraska, for example, a statute made as much of the common law as was applicable to its needs part of the law of the state. But the Supreme Court of Nebraska held that tenancy by the entirety was not part of the law of Nebraska, since the reason for the rule had changed.³⁶⁸ Of course, in some Western states the civil-law institution of community property has made this tenancy unnecessary.³⁶⁹

But generally tenancy by the entirety has not been abolished; more than that, it has not shared the disfavor to which the joint estate has been subject.³⁷⁰ It is true that survivorship is not so harsh between husband and wife because of the usual community of heirs, and by its use the delay and expense of administration may be avoided when one spouse dies.

In a joint tenancy, although each owned all, according to the legal fiction, each had a severable interest;³⁷¹ each had a right to share in the rents collected.³⁷² But a tenancy by the entirety was

based on the absolute unity of husband and wife. Neither had a separate or severable interest.³⁷³ The whole income from the estate was the husband's by the marital right.³⁷⁴ When the married women's acts were passed during the last century, the absolute unity of husband and wife was ended.³⁷⁵ It is interesting to note what effect these acts had on the ancient tenancy by the entirety.

In some states, as in England,³⁷⁶ it was held that a system of landholding which was dependent on the absolute unity of husband and wife could not survive the abolition of that unity.³⁷⁷ In New Jersey and New York, perhaps in what was thought to be a realistic approach, it was held that both the husband and the wife were entitled to share in the income from property held by the entirety.³⁷⁸ Consequently, a creditor or a mortgagee of either would be able to reach the interest which either owned.³⁷⁹ As the court itself explained it: during the joint lives of the husband and wife, it was as if they held as tenants in common—except that the estate remained inseverable and with survivorship annexed.³⁸⁰ It was rather a strange hybrid that resulted: a holding by moieties by the entirety. The result was reasonable enough if the property was income property. But suppose the property was the family home or farm? The creditor or mortgagee could not force a partition, nor could he force the other spouse to vacate or to pay rent.³⁸¹ An impasse might result, lasting until broken by the death of one spouse. The Pennsylvania courts have answered the problem in quite a different fashion. It is there held that property held by the entirety is immune from ordinary judicial process: that neither tenant may by himself charge or encumber the property.³⁸² After a judgment has been recovered against *H*, for instance, *H* may join with *W* and convey a good title to a third party.³⁸³ In Massachusetts, in complete surrender to simplicity, the husband is given the same rights which he had at the com-

mon law—he alone is entitled to the income during their joint lives.³⁸⁴ A creditor of the wife, therefore, will obtain no satisfaction until the death of the husband; a creditor of the husband is entitled to the whole income, subject only to the right of survivorship in the wife.³⁸⁵

Tenancy by the entirety was for a time popular as a means of evading inheritance or succession taxes. It was solemnly held that, at *H's* death, *W* acquired nothing which she did not already own.³⁸⁶ The modern estate-tax statutes, however, specifically cover the situation, and property acquired by survivorship is taxable.³⁸⁷

The reaction against survivorship in the early years of the nation was too extreme. The incident of survivorship is desirable in the case of joint executors and trustees. The joint bank account serves a useful purpose. Various future gifts must depend on the fact of survivorship. But the law of future interests is becoming simple and flexible enough to absorb most of the functions of the *jus accrescendi*. New statutes are making the law governing joint bank accounts consistent with current banking practice. It is now time to consider whether these ancient and decadent tenancies have any further reason for existence.³⁸⁸

X

The progress toward a modern law of estates has been considerable. Much of the medieval law has become obsolete. But the story of the experience of the last century is, nevertheless, a rather dismal one. The attempts at statutory reform have for the most part been naïve and crude. The courts, except for a brief period of revolt against feudal institutions, have not only not been resourceful or progressive, they have been reactionary and unsympathetic with the attempts at statutory reform. Surely the doctrine of *stare decisis* does not require such devotion to the old learning. Even

the New York revision, undertaken under almost ideal circumstances, has, in some particulars, left the law in a worse plight than it was before.

The experience of the century, nevertheless, seems to indicate that a general revision, hazardous as it is, is the only real hope. The courts have demonstrated their inability to adapt the medieval law to our needs. The occasional, restricted statutes have been too unscientifically drafted and too poorly integrated with the general law to withstand the tradition that statutes in derogation of the common law must be strictly construed.

It is conceivable that the *Restatement of Property* may suggest the text for better statutes and may inspire more progressive decisions in jurisdictions not already bound by precedent. Thus the mythical "majority view," so formed, might be used to bludgeon the older states into line. But this process is extremely slow; the last century furnishes abundant proof of this.

A revision on bold lines seems desirable.³⁸⁹ A simple, flexible system of future interests is possible, with all interests indestructible, alienable, and subject to a rationalized rule against perpetuities. Powers of termination and possibilities of reverter can be assimilated; the use of the condition can be greatly curtailed. The marital life-estates can be supplanted. The functions of the *jus accrescendi* can be largely absorbed. But such a task is to be approached with great humility. The last century has shown what can happen to the works of revisers of even extraordinary ability.

NOTES

¹ Butler, a distinguished lawyer, was attorney general in the cabinets of Jackson and Van Buren. He was also secretary of war under Van Buren, and was offered the same post by Polk.

² The principal work on the revision was done by Butler, John Duer (later justice and chief justice of the Superior Court in New York), and John C. Spencer (secretary of war under Tyler). Chancellor Kent had declined an appointment. The revisers were ap-

pointed in New York in 1825 and succeeding years. FOWLER, *HISTORY OF THE LAW OF REAL PROPERTY* (1895) 92, n. 5. See memorial address at death of Duer, 6 Duer, VII-XXV, esp. XIV. The part of the revision relating to land was passed Dec. 10, 1828, and took effect Jan. 1, 1830. N. Y. Laws 1828-29, 19. FOWLER, *supra* at 103. The notes of the revisers appear in the various official reports of the commissioners to the legislature, in the appendix of the Revised Statutes of 1836, and, so far as property is concerned, may be found most conveniently in the appendix of FOWLER, *REAL PROPERTY* (3d ed. 1909) 1269-1320.

³ In 1835 Butler undertook the establishment of a school to give systematic instruction in legal science. In 1838, the faculty consisted of Butler, principal of the faculty, and two associates, William Kent (son of James Kent, author of the *COMMENTARIES*) and David Graham, Jr. For the next twenty years, however, the school had only an intermittent existence. For a complete account, see NEW YORK UNIVERSITY 1832-1932 (1933) c. 11, *The School of Law* by Leslie J. Tompkins.

⁴ Kent, then a professor in the Columbia Law School, had published the first volume of his *COMMENTARIES* in 1826 and the final volume in 1830. See HICKS, *MEN AND BOOKS* (1921) c. 6, *James Kent and His Commentaries*.

⁵ The most conspicuous example, of course, is the English Acts commission which drafted the *PROPERTY ACTS OF 1925*. For general discussion see: Johnson, *The Reform of Real Property Law in England* (1925) 25 *COL. L. REV.* 609; Boardwell, *English Property Reform and Its American Aspects* (1927) 37 *YALE L. J.* 1, 179. The reports of various other commissions are cited *infra*.

⁶ Six tentative drafts have appeared, the first in March 1929, and one each succeeding March except 1932. A proposed final draft was published in March 1936.

⁷ Bentham died in 1832. See Noble, *Bentham and the Codifiers* (1900) 13 *HARV. L. REV.* 344-357.

⁸ GRAY, *RULE AGAINST PERPETUITIES* (3d ed. 1915) 568; Canfield, *The New York Revised Statutes and the Rule Against Perpetuities* (1901) 1 *COL. L. REV.* 224-234.

⁹ *Supra* note 2.

¹⁰ WALSH, *A HISTORY OF ANGLO-AMERICAN LAW* (2d ed. 1932) 171. In New York and some other states tenure and its incidents are expressly abolished. *Id.* 171 n. 17. See further Vance, *The Quest for Tenure* (1923) 33 *YALE L. J.* 248.

¹¹ 4 KENT, *COMM.* (1826) 6 *et seq.* (original paging used).

¹² HUMPHREYS, *OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS ON REAL PROPERTY WITH OUTLINES FOR A SYSTEMATIC REFORM* (2d ed. London, 1827) 275-280.

¹³ *Temple v. Morse*, 178 Mass. 336, 59 N. E. 846 (1901); *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391 (1890); *Smith v. Haskins*, 22 R. I. 6, 45 Atl. 741 (1900); WALSH, *THE LAW OF PROPERTY* (2d ed. 1927) 140-142.

¹⁴ *Cole v. Lake Company*, 54 N. H. 242, 279 (1874).

¹⁵ HUMPHREYS, *op. cit. supra* note 12, at 275, Art. 48 of his proposed code.

¹⁶ 4 KENT *op. cit. supra* note 11, at 9 n. 2.

¹⁷ *Whelpley, J.*, in *Adams and Traphagan v. Ross*, 30 N. J. L. 505, 513 (1860).

¹⁸ *Id.* at 505.

¹⁹ *Branca v. Makuakane*, 13 Haw. 499 (1901).

²⁰ *Cole v. Lake Co.*, 54 N. H. 242 (1874).

²¹ See the summary of the decisions collected by the reporter of the *RESTATEMENT, PROPERTY*, Expl. Notes, Tent. D. (1929) No. 1, 14. A dictum in Vermont is in accord

with the New Hampshire case: *Johnson v. Barden*, 86 Vt. 19, 83 Atl. 721 (1912). Decisions in Ohio [mortgage, *Brown v. The Bank*, 44 Ohio St. 269, 6 N. E. 648 (1886)] and Maryland [deed referring to will, *Merritt v. Disney*, 48 Md. 344 (1877)] have modified the rule in special cases, but are considered as exceptions. See *Handy v. McKim*, 64 Md. 560, 572, 4 Atl. 125 (1885). In North Carolina a purchaser was compelled to take a title which was conveyed to the grantor "and her nearest blood relations forever" on the ground that the court could reform the deed by inserting the technical words. *Whichard v. Whitehurst*, 181 N. C. 79, 106 S. E. 463 (1921).

²² *Infra* notes 24-31.

²³ The Reporter of the Restatement has found twenty-four decisions in thirteen different jurisdictions from 1819 to 1924 in which it was held that a fee was not created because the word "heirs" was not used. *RESTATEMENT, op. cit. supra* note 21, at Expl. 5-14.

²⁴ Virginia in 1792, Kentucky in 1797, Alabama in 1812, Mississippi in 1824, New York in 1830, and Missouri in 1835. 4 KENT, *op. cit. supra* note 11, at 8, n. i.

²⁵ STIMSON, *AMERICAN STATUTE LAW* (1886) § 1474.

²⁶ Mass. Gen. Laws 1921, c. 183, § 13.

²⁷ Ohio Laws, 1925, 18, § 8510-1, OHIO ANN. CODE (Throckmorton, 1930) T. VIII, § 8510-1.

²⁸ R. I. Acts, 1927, 268, § 6.

²⁹ *RESTATEMENT, PROPERTY*, Proposed Final D. § 30, Special note. The states are Connecticut, Louisiana, Maine, New Hampshire, New Mexico, South Carolina, and Vermont.

³⁰ The rule never existed in Louisiana. It was abrogated by decision in New Hampshire and perhaps in Vermont. *Ibid.*

³¹ As of Jan. 1, 1936, the statutes are listed and classified by the Reporter in *id.*, § 48, spec. note. Cf. 5th Tent. D. *UNIFORM ESTATE ACT* (1935) § 7.

³² *Tyler v. Triesback*, 69 Fla. 595, 69 So. 49 (1915) [on the authority of *Ivey v. Peacock*, 56 Fla. 440, 47 So. 481 (1908)]; *Brown v. Dickey*, 106 Me. 97, 75 Atl. 382 (1909); *Temple v. Morse*, 178 Mass. 336, 59 N. E. 845 (1901); *Klengler v. Wick*, 266 Pa. 1, 109 Atl. 542 (1920); *Wilson v. Poston*, 129 S. C. 345, 123 S. E. 849 (1924).

³³ *Supra* note 31.

³⁴ Note the interesting, although not conclusive, tables worked out by the New York Law Revision Commission (LEG. DOC. 1936, No. 65H, cited *infra* note 226, 5). All of the cases involving the New York statutes against the suspension of the absolute power of alienation are tabulated for 1904, 1914, 1924, and 1934. The cases involving future interests are about constant, but there is a steady increase in the number of cases involving the validity of trusts.

³⁵ *RESTR., op. cit. supra* note 21, at No. 3, especially §§ 172, 177, and 178. Section 165, an especially good example, was omitted in the Proposed Final Draft. Note the dissent from Sec. 165 by Professor Rundell, *id.* at 236.

³⁶ For instance, the sections stating a scientific method of apportioning both burdens and benefits between life tenant and remainderman (§§ 177 and 178); the section stating the circumstances under which a life tenant has the power to obtain contribution for the cost of an improvement where there is no special assessment (§ 172); the somewhat controversial Section 165 about the proceeds from the sale of unproductive property

(omitted in the Proposed Final Draft); and the sections (183-191) which state the principles of a modern law of waste.

³⁷ WALSH, *op. cit. supra* note 10, at 144-148.

³⁸ WALSH, *op. cit. supra* note 13, at 209-211.

³⁹ See tables cited *infra* note 40.

⁴⁰ See *Summary of Statutory Provision of Other States upon Dower, Curtesy etc.*, REPORT OF THE DECEDENT ESTATE COMM. OF NEW YORK (1930) 300-303. The thirty-six states that had abolished curtesy at that date are listed, with the dates of the statutes.

⁴¹ *Id.* at 301.

⁴² N. Y. REAL PROP. LAW (1929) §§ 189, 190, CONS. LAWS (Cahill, 1930) c. 51; N. Y. DEC. EST. LAW (1929) §§ 18, 82, 83, and 87, CONS. LAWS (Cahill, 1930), c. 13.

⁴³ N. H. LAWS, 1933, c. 118. §§ 1-5. Curtesy is not abolished but other elections are made more attractive.

⁴⁴ District of Columbia, New Hampshire, New Jersey, North Carolina, Rhode Island, and Tennessee. REPORT, *op. cit. supra* note 40, at 303. But as to New Hampshire, see *supra* note 43.

⁴⁵ Delaware, Kentucky, Oregon, Virginia, West Virginia, Wisconsin. REPORT, *op. cit. supra* note 40, at 303.

⁴⁶ Clifford v. Kampfe, 147 N. Y. 383, 42 N. E. 1 (1895); 1 STORY, EQUITY (4th ed. 1846) § 629.

⁴⁷ 4 KENT, *op. cit. supra* note 11, at 41.

⁴⁸ Connecticut, Georgia, North Carolina, Tennessee, and Vermont. *Id.* at 41, n. c.

⁴⁹ Cf. the opinions of two experienced surrogates, James A. Foley and George A. Slater, who were members of the New York Commission to Investigate Defects in the Law of Estates. REPORT, *supra* note 40, at 272 *et seq.*, 282 *et seq.*

⁵⁰ 3 & 4 Wm. IV, c. 105 (1833).

⁵¹ Dower has been abolished, prospectively, in twenty-five states. The states are listed, with dates of their statutes, REPORT, *supra* note 40, at 295. Since the date of the REPORT, New York has abolished dower prospectively, REAL PROP. LAW, *op. cit. supra* note 42, at 190; and has given a widow a set of elections that are almost always more attractive than existing dower, DEC. EST. LAW, *op. cit. supra* note 42, at 18, 82, 83. Other states, which have not abolished dower or curtesy, have given the surviving spouse elections which are more attractive. Two states adopting such a statute since the date of the REPORT, *op. cit. supra* note 40, are: Michigan, Mich. Pub. Acts, Sess. of 1931, 126, § 13440; 421, § 13085; New Hampshire, N. H. LAWS of 1933, c. 118, § 1-5. Cf. UNIFORM DOWER RIGHTS ACT (1st Tent. D. 1933) § 1, Handbook, COMM. ON UNIFORM STATE LAWS (1933) 346.

⁵² The REPORT, *op. cit. supra* note 40, at 299, lists twenty-three states as having a common law or regulated form of dower. Dower was unknown in some of the civil-law states (Louisiana, New Mexico, and Texas) and was not consistent with the law of community property in other Western states. *Id.* at 296.

⁵³ 4 KENT, *op. cit. supra* note 11, at 35 *et seq.*; WALSH, *op. cit. supra* note 13, at c. 5.

⁵⁴ Cf. criticism of common-law authority in Lessee of Borland v. Marshall, 2 Ohio St. 308 (1853).

⁵⁵ 4 KENT, *op. cit. supra* note 11, at 215 *et seq.*

⁵⁶ *Supra* notes 11-32.

⁵⁷ CO. LITT. 22b; 1 SIMES, LAW OF FUTURE INTERESTS (1936) c. 8. Cf. *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919).

⁵⁸ 4 KENT, *op. cit. supra* note 11, at 227, 232, and esp. 233 n. a.

⁵⁹ Cited, *id.* at 232.

⁶⁰ 41 N. Y. 66 (1869); *Wheeler, Moore v. Littel and the Jackson Title* (1901) 1 COL. L. REV. 347.

⁶¹ 1 SIMES, *op. cit. supra* note 57, at §§ 83-92. Cf. Hargrave, *Observations concerning the rule in Shelley's Case*, HARG. LAW TRACTS 551.

⁶² Legislation Note (1935) 4 FORDHAM L. REV. 316, 319, nn. 25-34, *The Rule in Shelley's Case Has Been Abolished—Sed. Quare.*

⁶³ *Williams v. Foster*, 3 Hill 193 (S. C. 1836); *Polk v. Farris*, 9 Yerg. 209 (Tenn. 1836).

⁶⁴ 13 Pa. 344 (1850), at 351: "The rule in Shelley's case ill deserves the epithets bestowed on it in the argument. Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. It is part of a system; an artificial one, it is true, but still a system, and a complete one. . . . In a masterly disquisition on the principles of expounding dispositions of real estate, Mr. Hayes, who has sounded the profoundest depths of the subject, is by no means clear that the rule ought to be abolished even by the legislature; and Mr. Hargrave shows, in one of his tracts, that to engraft purchase on descent, would produce an amphibious species of inheritance, and confound a settled distinction in the law of estates."

⁶⁵ Opinion of Lord Macnaughten in *Van Grutten v. Foxwell*, [1897] A. C. 658; 1 SIMES, *op. cit. supra* note 57, at § 116.

⁶⁶ *Perrin v. Blake*, 1 W. Bl. 672 (1769).

⁶⁷ WILLIAMS, REAL PROP. (23d ed. 1920) 386 n. c. Cf. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (1929) 359-360.

⁶⁸ GOODEVE, LAW OF REAL PROPERTY (4th ed.) 239-240.

⁶⁹ 4 KENT, *op. cit. supra* note 11, at 232.

⁷⁰ 1 SIMES, *op. cit. supra* note 57, at 206-208.

⁷¹ *Van Grutten v. Foxwell*, [1897] App. Cas. 658. Note, for example, the controversy between Mansfield and Fearn following *Perrin v. Blake*, 1 W. Bl. 672 (1769) Appendix, FEARNE, ESSAY ON CONTINGENT REMAINDERS (5th ed. 1794).

⁷² 127 Iowa 36, 102 N. W. 177 (1905); see especially the dissenting opinion of Weaver, J.

⁷³ 4 KENT, *op. cit. supra* note 11, at 233 n. a. In reaction to the New York statute abolishing the Rule in Shelley's Case, Kent wrote in part: "The judicial scholar. . . will have no more concern with the powerful and animated discussions in *Perrin v. Blake*, which awakened all that was noble and illustrious in talent and endowment through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearn, the acute and analytical essay of Preston, the neat and orderly abridgement of Cruise, and the severe and piercing criticisms of Reeve. . . ."

⁷⁴ Massachusetts in 1791, New Jersey in 1820, Maine in 1821, Connecticut in 1821, and Rhode Island in 1822. Note (1932) 45 HARV. L. REV. 571, 572 nn. 11, 12.

⁷⁵ N. Y. REV. STAT. (1830) pt. 2, c. 1, tit. 2, § 28.

⁷⁶ STIMSON, *op. cit. supra* note 25, at 176.

⁷⁷ Statutes applicable to deeds and wills exist in Alabama, Arizona, California, Connecticut, District of Columbia, Georgia, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New York, New Jersey, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin. Statutes applicable only to wills exist in Kansas, New Hampshire, Ohio, and Oregon. The New Mexico statute is obscure but entertaining. For citations, see 1 SIMES, *op. cit. supra* note 57, at 247-248, nn. 52-84; Legislation Note, *supra* note 62, at 320 n. 39; Note, *supra* note 74, at 573, n. 17.

⁷⁸ POUND, *Common Law and Legislation* (1917) 21 HARV. L. REV. 383.

⁷⁹ 2 N. J. COMP. STAT. (1910, 1921) § 10 at p. 1921. The Rule in Shelley's Case was completely abolished in New Jersey in 1934: N. J. LAWS 1934, c. 204.

⁸⁰ Lippincott v. Davis, 59 N. J. L. 241, 28 Atl. 587 (1896); Woodbridge v. Jarrard, 101 N. J. Eq. 439, 138 Atl. 536 (1927); see also, Zabriskie v. Wood, 23 N. J. Eq. 541 (1872).

⁸¹ KAN. REV. STAT. (1923) 22-256.

⁸² Opinion of Mason, J., in Gardner v. Anderson, 114 Kan. 778, 116 Kan. 431 (on rehearing), 227 Pac. 743 (1924); Burch, J., in Allen v. Pedder, 119 Kan. 773, 241 Pac. 696 (1925); Davis v. Davis, 121 Kan. 312, 246 Pac. 982 (1926).

⁸³ Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738 (1919).

⁸⁴ W. Va. Code (Barnes, 1923) c. 71, § 11.

⁸⁵ 2 MINOR'S INSTITUTES (4th ed.) 412.

⁸⁶ *Supra* note 83. See Simonon, *The Rule in Shelley's Case in West Virginia* (1920) 26 W. VA. L. REV. 178, 182.

⁸⁷ 1 SIMES, *op. cit. supra* note 57, §§ 136-141. Foster, *Rule in Shelley's Case in Nebraska* (1929) 8 NEB. L. B. 124.

⁸⁸ W. Va. CODE (1932) § 3534.

⁸⁹ *Supra* note 79. Cf. Uniform Estate Act (5th Tent. D. 1935) § 23, Handbook, *supra* note 51, 153.

⁹⁰ 1 SIMES, *op. cit. supra* note 57, § 135. The States are Arkansas, Colorado, Delaware, Florida, Illinois, Indiana, Nebraska, North Carolina, and Texas. Pennsylvania has very recently abolished the rule. Penna. Laws of 1935, p. 1013. Washington seems to recognize the rule although a statute may apply.

⁹¹ *Id.* The states are Nevada, Utah, and Wyoming.

⁹² Note (1932) *supra* note 74, at 571, 573 *et seq.*; Note (1935) 4 FORDHAM L. REV. 316, 321 *et seq.*

⁹³ 4 KENT, *op. cit. supra* note 11, at 15 *et seq.*

⁹⁴ HACKETT, POLITICAL AND SOCIAL GROWTH OF THE UNITED STATES (1933) 251 *et seq.*; 1 BEARD AND BEARD, RISE OF AMERICAN CIVILIZATION (1930) 135-138.

⁹⁵ CHINARD, THOMAS JEFFERSON (1929) 88, 89. PAXSON, HISTORY OF THE AMERICAN FRONTIER 1763-1893 (1924) 68.

⁹⁶ Georgia in 1777; North Carolina in 1784; Virginia in 1785; Maryland, 1786; New York, 1786; South Carolina, 1791; and Rhode Island in 1798; Morris, *Primogeniture and Entailed Estates in America* (1927) 27 COL. L. REV. 24.

⁹⁷ Except Maryland, Rhode Island, and South Carolina. See list in order of dates in succeeding note.

⁹⁸ Virginia in 1776; New York in 1782; Connecticut, New Jersey, North Carolina,

and Tennessee in 1784; Kentucky in 1796; and Georgia in 1799. 4 KENT, *op. cit. supra* note 11, at 14 n. a, 15 nn. a, b.

⁹⁹ The fee-tail was preserved for the life of the donee only. CONN. STAT. OF 1784.

¹⁰⁰ The first New Jersey statute was in 1784. The statute of 1820 established what is known as the New Jersey type of pattern: a life estate to the donee, with remainder to the heirs of his body in fee. In 1934 the fee-simple pattern was substituted. LAWS NEW JERSEY, 1934, c. 205.

¹⁰¹ 4 KENT, *op. cit. supra* note 11, at 15.

¹⁰² Alabama in 1812; Mississippi in 1822; Ohio in 1831; Illinois in 1833; and Missouri in 1835. *Id.* at 15 n. b.

¹⁰³ *Supra* notes 98 and 102.

¹⁰⁴ Louisiana, South Carolina, and Vermont. 4 KENT, *op. cit. supra* note 11, at 15.

¹⁰⁵ Delaware, Maryland, Maine, Massachusetts, New Hampshire, Pennsylvania, and Rhode Island. *Id.* n. b.

¹⁰⁶ STIMSON, *op. cit. supra* note 25, § 1313 (c).

¹⁰⁷ *Id.* § 1313 (a) (b) (d).

¹⁰⁸ *Id.* § 1313 (b).

¹⁰⁹ *Ibid.*

¹¹⁰ *Id.* § 1313 (a).

¹¹¹ The jurisdictions are: Alabama, Arizona, California, District of Columbia, Georgia, Indiana, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin. REST., *op. cit. supra* note 21, at No. 2 § 143, note (except for New Jersey). The proposed Uniform Estate Act adopts the fee-simple pattern (5th Tent. D. 1935) § 8, Handbook, *supra* note 51, 149.

¹¹² KANS. REV. STAT. (1923) 22-256, Schwartz v. Rabe, 129 Kan. 430, 283 Pac. 642 (1930). The other states now having this pattern are: Arkansas, Colorado, Georgia, Illinois, Missouri, New Mexico, and Vermont. REST., *op. cit. supra* note 21, at No. 2, § 139; REST., PROP. (Final D.), Tit. D., Spec. Note.

¹¹³ New Jersey, *supra* note 100.

¹¹⁴ Rooke v. Queen's Hospital, 12 Hawaii 375 (1900); Nahaolelua v. Heen, 20 Hawaii 372 (1911); Boeynaems v. Ah Leong, 21 Hawaii 699 (1913); Kinney v. Oahu Sugar Co., 23 Hawaii 747 (1917); Rosenbledt v. Wodehouse, 25 Hawaii 561 (1920).

¹¹⁵ Maryland: Posey's Lessee v. Budd, 21 Md. 477 (1863); New Hampshire: Dennett v. Dennett, 40 N. H. 498 (1860); Merrill v. Am. Bapt. Mis. U., 73 N. H. 414, 62 Atl. 728 (1905).

¹¹⁶ Murrell v. Matthews, 2 Bay. Law 397 (S. C. 1802); Burnett v. Burnett, 17 S. C. 545 (1882); Antley v. Antley, 132 S. C. 306, 128 S. E. 31 (1925).

¹¹⁷ Pierson v. Lane, 60 Iowa 60, 14 N. W. 90 (1882); Kepler v. Larson, 131 Iowa 438, 108 N. W. 1033 (1906); Shope v. Unknown Claimants, 174 Iowa 662, 156 N. W. 850 (1916).

¹¹⁸ Sagers v. Sagers, 158 Iowa 729, 138 N. W. 911 (1912).

¹¹⁹ Yates v. Yates, 104 Neb. 678, 178 N. W. 262 (1920).

¹²⁰ Oregon: Rowland v. Warren, 10 Ore. 129 (1883).

¹²¹ REST., *op. cit. supra* note 21, at No. 2, § 120, Note. As to Kansas, there listed, see note 112 *supra*. There has been considerable litigation in Delaware, Kansas, Maine, Massachusetts, and Rhode Island. *Id.*, Notes to Tent. D. No. 1., 33-37.

¹²² *Id.* at No. 2, § 121 and Special Note.

¹²³ *Id.* §§ 121, 122.

¹²⁴ *Id.* § 123.

¹²⁵ 4 KENT, *op. cit. supra* note 11, at 19 *et seq.*

¹²⁶ FITZHUGH, *SOCIOLOGY FOR THE SOUTH* (1854) 189-193, cited by Morris, *loc. cit. supra* note 96.

¹²⁷ Sangor, *Estates Tail under the New Law* (1925) 2 CAMBRIDGE L. J. 212-214.

¹²⁸ *Ibid.*

¹²⁹ Morris, *loc. cit. supra* note 96.

¹³⁰ *Id.* at 47, 48. Riggs v. Sally, 15 Me. 408 (1839); Corbin v. Healy, 37 Mass. 514 (1838).

¹³¹ Morris, *supra* note 96, at 51, n. 191.

¹³² Note, for example, the authors admired by Kent (*supra* note 73): BLACKSTONE'S COMMENTARIES were published in 1765-1769 and had run through nineteen editions by 1836. Hammond, *Biography of the Commentaries*, JONES'S BLACKSTONE (1915) XXI-XXXVI. CRUISE'S DIGEST was in its third American edition in 1827. FEARNE'S ESSAY ON CONTINGENT REMAINDERS was first published in 1772; a third American edition from the eighth English edition, with the notes of Charles Butler, was published in 1826. PRESTON'S TREATISE ON ESTATES was first published in 1791 with a second and enlarged edition in 1820. The first of HARGRAVE'S TRACTS was published in 1787.

¹³³ HICKS, *op. cit. supra* note 4, at c. 5, *Blackstone and His Commentaries*.

¹³⁴ The third American edition, with Butler's notes, was published in 1826.

¹³⁵ 4 KENT, *op. cit. supra* note 11, at 246. There were a few statutes somewhat modifying the rigor of the old law in Alabama, Mississippi, and Virginia, note *infra* 197.

¹³⁶ *Id.* at 248.

¹³⁷ *Id.* at 249 *et seq.*

¹³⁸ *Id.* at 237 *et seq.*, 269 *et seq.*; Waddell v. Rattew, 5 Rawle 231 (Pa. 1835).

¹³⁹ 4 KENT, *op. cit. supra* note 11, at 200 *et seq.*

¹⁴⁰ *Id.* at 264 *et seq.*

¹⁴¹ HUMPHREYS, *op. cit. supra* note 12. The writings of Jeremy Bentham, in criticism of Blackstone and judge-made law and in favor of general codification, were having effect. "Unheeded for a quarter of a century, toward the close of his life [1832], Bentham drew to his support a brilliant school, composed of such men as Austin, John Stewart Mill, father and son, Macauley, Romilly, Brougham and Longdale." Preface to N. D. REV. STAT. (1895). See also, Noble, *supra* note 7, at 344-357.

¹⁴² *Supra* note 17.

¹⁴³ *Supra* note 11.

¹⁴⁴ *Ibid.*

¹⁴⁵ For example, in a note on Crump v. Norwood, Kent said: "This is one among a thousand samples of the refinements which have gradually accumulated, until they have, in a very considerable degree, overshadowed and obscured many parts of the English law of real property; and I am more and more impressed with a sense of the great utility of the provision rescuing contingent remainders, by legislative authority, from all perplexing dependence on the particular estate." KENT, *op. cit. supra* note 11, at 254, n. b.

¹⁴⁶ For example, Hilliard in his text on Real Property, published in 1846, cites practically no American cases but assumes that the English law prevailed except where expressly changed by statute. For example see the chapters XLVII to XLIX on destructibility of contingent interests.

¹⁴⁷ After pointing out the hazards and difficulties of drawing a will or family settle-

ment in England, the New York revisers said: "It is true, that in this state, these evils are not yet extensively felt, but we may be sure they will not fail to display themselves, as property advances in value, capital is accumulated, and the rich become anxious to secure their possessions to a distant posterity." Original note part II, c. 1, to tit. II, art. 1; FOWLER, *REAL PROPERTY* 2 (3d ed. 1909) 1277.

¹⁴⁸ Cases cited *infra* notes 172, 173, 188, 193, 195.

¹⁴⁹ Cases cited *infra* note 188.

¹⁵⁰ For example, see opinion of Gibson, J., in *Dunwoodie v. Reed*, 3 Serg. & R. 435 (Pa. 1817). He is quoted in a later case to have said: "Now this principle of forfeiture as affecting other interests than those of the party, is adverse to the habits and feelings of our country, and irreconcilable to the spirit and principles of our civil institutions." *Harris v. McElroy*, 45 Pa. St. R. 216, 220 (1863). See, however, the opinion of Tilghman, C. J., in the *Dunwoodie* case.

¹⁵¹ Even now, New Hampshire is the only state that has, without a statute, escaped from the tyranny of the feudal concept of seisin in regard to contingent remainders. *Infra*, note 204. So great a master of the English system as Sugden, in response to a letter from an American gentleman who suggested that a treatise on powers would soon be required in this country, remarked: "I regretted at the time that a new state should embarrass itself with our forms of conveyancing, springing out of the doctrine of uses." Sugden's letter to J. Humphreys, cited in the notes of the N. Y. revisers to Art. III, FOWLER, *op. cit. supra* note 147, at 1304.

¹⁵² *Supra* note 14.

¹⁵³ *Supra* note 75; 1 REV. STAT. (1836) pt. II, 1, tit. II, art. 1, § 28.

¹⁵⁴ *Id.* §§ 4, 22. (See notes to § 4, FOWLER, *op. cit. supra* note 147, at 1274-1276.)

¹⁵⁵ The object of the revisers is thus stated by them: "It is to abolish all technical rules and distinctions, having no relation to the essential nature of property and the means of its beneficial enjoyment, but which derived from the feudal system, rest solely upon feudal reasons; to define with precision the limits within which the power of alienation may be suspended by the creation of contingent estates, and to reduce all expectant estates substantially to the same class, and apply to them the same rules whether created by deed or devise." Note to Art. 1, *supra* note 153; FOWLER, *op. cit. supra* note 147, at 1278.

¹⁵⁶ 1 REV. STAT. (1836) pt. II, c. 1, tit. 2, art. 1, § 24.

¹⁵⁷ *Id.* § 23.

¹⁵⁸ *Id.* § 24.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Id.* § 25.

¹⁶¹ *Id.* § 26.

¹⁶² *Id.* § 27.

¹⁶³ *Id.* § 21.

¹⁶⁴ *Id.* § 32.

¹⁶⁵ *Id.* § 33.

¹⁶⁶ *Id.* § 34.

¹⁶⁷ *Id.* § 35.

¹⁶⁸ *Id.* §§ 14, 20, 24.

¹⁶⁹ *Infra* notes 197-207 and 215-218.

¹⁷⁰ *Infra* notes 208, 209, and 220.

¹⁷¹ 4 KENT, *op. cit. supra* note 11, at 234.

¹⁷² *Jackson v. Sebring*, 16 Johns 515 (N. Y. 1819).

¹⁷³ *Welsh v. Foster*, 12 Mass. 93 (1810).

¹⁷⁴ Many cases cited, *Rood, The Statute of Uses and the Modern Deed* (1904) 4 MICH. L. REV. 109, 118 nn. 19, 20.

¹⁷⁵ *Id.* at 116, n. 14.

¹⁷⁶ *Id.* at 112, n. 9; *Wyman v. Brown*, 50 Me. 139 (1863).

¹⁷⁷ *Rood, supra* note 174, at 111, n. 7.

¹⁷⁸ *Id.* at 119, n. 23, note especially *Ferguson v. Mason*, 60 Wisc. 377, 19 N. W. 420 (1884).

¹⁷⁹ *Id.* at 119, nn. 22, 23. 1 SIMES, *op. cit. supra* note 57, at 279; Boardwell, *The Conversion of the Use Into a Legal Interest* (1935) 21 IOWA L. REV. 48. Cf. *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214 (1899).

¹⁸⁰ Cf. the statement by Professor Boardwell, *supra* note 179, at 49: "But strange as it may seem there is still much work to be done before it is established that by an ordinary deed inter vivos a man can create the same kind of interests that he can by an instrument taking effect only when he is dead and gone." Boardwell, *The Conversion of the Use into a Legal Interest* (1935) 21 IOWA L. REV.

¹⁸¹ Walsh, *Contingent Remainders and Executory Estates under the Modern Law* (1928) 5 N. Y. U. LAW QUARTERLY REV. 7.

¹⁸² Thorndike, *Contingent Remainders* (1917) 30 HARV. L. REV. 226.

¹⁸³ Cf. opinion of Tilghman, C. J., in *Dunwoodie v. Reed*, 3 Serg. & R. 435, 448 (Pa. 1817). "Moreover, I doubt very much, whether it be not the policy of this country to facilitate the destruction of contingent remainders, as well as of estates tail. They tend to prevent the free enjoyment and alienation of land; whereas the spirit of our constitution and laws, has a direct contrary tendency."

¹⁸⁴ Before the rule against perpetuities was extended to contingent remainders, there was a somewhat reasonable defense for the destructibility rule. That the rule now extends to all future contingent estates, see GRAY, *op. cit. supra* note 8. Cf. the curiously recent article, Farrer, *That the Modern Rule of Perpetuity Did Not Apply at Law to a Contingent Remainder* (1935) 51 L. Q. REV. 668.

¹⁸⁵ 1 SIMES, *op. cit. supra* note 57, § 104, citing several American cases: *Webster v. Gillman* 1 Story, 499 (C. C. Me. 1841); *Vanderheyden v. Crandall*, 2 Denio 9 N. Y. 1846; *Dehon v. Redfern*, 1 Dud. Eq. 115, 119 (S. C. 1838); *Young v. McNeill*, 78 S. C. 143, 148, 59 S. E. 986, 987 (1907).

¹⁸⁶ 8 & 9 VICT. c. 106, § 8 (1845). This statute prevented the destruction of the remainder only by a premature ending of the precedent estate.

¹⁸⁷ 40 & 41 VICT. c. 33, § 1 (1877). This statute made contingent remainders as indestructible as executory limitations.

¹⁸⁸ According to the analysis of the authorities by the Reporter of the Restatement of Property (Rest., Tent. D. No. 6, Expl. Notes, 192 ff.), there are square adjudications in three of the older states, Mississippi, Pennsylvania, and Tennessee, and two of the younger states, Florida and Oregon, that destructibility exists (*id.* at 194, nn. 26-30); there are dicta in three of the older states, Maryland, North Carolina, and South Carolina, and in Arkansas and Indiana that destructibility exists (*id.* at 195, n. 33); decisions that statutes changed the existing law, in the District of Columbia, Illinois, and Iowa (*id.* at 196, nn. 34-36); and dicta that statutes changed the existing law, in Alabama, Georgia, Kentucky, New York, and Ohio (*id.* at 197-198, n. 41). There appear to be no decisions or dicta in Connecticut, Delaware, or New Jersey (*id.* at 195, n. 32).

¹⁸⁹ STIMSON, *op. cit. supra* note 25, § 1402.

¹⁹⁰ New York before 1830, 4 KENT, *op. cit. supra* note 11, at 498; Delaware; STIMMONS, *op. cit. supra* note 25, § 1473.

¹⁹¹ Waddell v. Rattew, 5 Rawle 231 (Pa. 1835); Delaware, Maryland, and Pennsylvania, 4 KENT, *op. cit. supra* note 11, at 498.

¹⁹² *Id.* at 497.

¹⁹³ So complicated and esoteric did the learning on this subject become that Preston devoted an entire volume of his textbook on conveyancing to merger. 3 PRESTON, CONVEYANCING (1816).

¹⁹⁴ The first edition of KALES, FUTURE INTERESTS (1905) contained a discussion of whether or not the indestructibility rule prevailed in Illinois (pp. 131-133). There have been no less than twenty-five decisions in appellate courts of Illinois since that date on the question of merger as a means of destroying contingent remainders. 1 SIMES, *op. cit. supra* note 57, § 102, n. 27.

¹⁹⁵ Simes lists cases from Arkansas, District of Columbia, Florida, Illinois, Indiana, Maryland, Oregon, Pennsylvania, South Carolina, and Texas. *Id.* § 102, n. 27.

¹⁹⁶ Boardwell, *Seisin and Disseisin* (1921) 34 HARV. L. REV. 717, 737.

¹⁹⁷ A statute in Mississippi in 1822 abrogated the common-law rule against conveying a freehold to commence *in futuro*, MISS. CODE (1822) c. 104, § 25; a statute passed in 1812 in Alabama permitted children conceived but not born to take contingent remainders, 4 KENT, *op. cit. supra* note 11, at 249 n. c.; a statute in Virginia in 1819 was more like the modern statutes in making the contingent remainder not dependent on the preceding estate. VA. REV. CODE (1819) c. 99, § 20.

¹⁹⁸ MASS. REV. STAT. (1836) c. 59, § 7; ME. REV. STAT. (1841) c. 91, § 10.

¹⁹⁹ Idaho, Michigan, Minnesota, Montana, North Dakota, South Dakota, and Wisconsin. REST., *op. cit. supra* note 21, at No. 6, Ex. Notes, 197 n. 40.

²⁰⁰ ILL. ANN. STAT. (SMITH-HURD 1933) c. 148, § 24 (1921); IOWA CODE (1927) §§ 10046, 10047 (1923); OHIO LAWS 1931, §§ 10, 512-515, 516 (1931).

²⁰¹ SIMES, *op. cit. supra* note 57, § 111, nn. 79-97. Uniform Estates Act (5th Tent. D. 1935) § 19, Handbook, *op. cit. supra* note 51, at 152.

²⁰² *Ibid.* § 111, nn. 98-103.

²⁰³ Expl. Notes, *supra* note 199, 195, n. 32. In five states dicta in support of destructibility were found. *Id.* n. 33.

²⁰⁴ Dennett v. Dennett, 40 N. H. 498 (1860); Hayward v. Spaulding, 75 N. H. 92, 71 Atl. 219 (1908).

²⁰⁵ Evans v. Bishop Tr. Co., 21 Haw. 74 (1912).

²⁰⁶ A Kansas statute provides that a freehold may commence *in futuro*. This was enough for the Kansas court to enable it to abolish the destructibility rule. Miller v. Miller, 91 Kan. 1, 136 Pac. 953 (1913).

²⁰⁷ Massachusetts: Simonds v. Simonds, 199 Mass. 552, 85 N. E. 860 (1908); Ohio: Lessee of Thompson v. Hoop, 6 Ohio St. 481 (1856); Further, the doctrine of destructibility by merger has been largely eliminated in South Carolina by the decision of McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 978 (1906).

²⁰⁸ Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931); Irvine v. Newlin, 63 Miss. 192 (1885); Love v. Lindstedt, 76 Ore. 66, 147 Pac. 935 (1915); Jordan v. McClure, 85 Pa. 495, (1877); Ryan v. Monaghan, 99 Tenn. 338, 42 S. W. 144 (1897).

²⁰⁹ Expl. Notes, REST., *op. cit. supra* note 21, TENT. D. No. 6, 195 n. 33, analyzing cases from Arkansas, Indiana, Maryland, North Carolina, and South Carolina.

²¹⁰ *Supra* note 167.

²¹¹ Hall v. Chaffee, 14 N. H. 215 (1843); Hopper v. Demarest, 21 N. J. L. 525 (1848); Jackson *ex dem.* Varick v. Waldron, 13 Wend. 178 (N. Y. 1834).

²¹² 4 KENT, *op. cit. supra* note 11, at 260.

²¹³ *Id.* at 282 n. a.

²¹⁴ 8 & 9 VICT. c. 106, § 6.

²¹⁵ REST., *op. cit. supra* note 21, at No. 4, Expl. Notes, 128-133, esp. nn. 11-15.

²¹⁶ *Id.* at 130-132; 3 SIMES, *op. cit. supra* note 57, § 713.

²¹⁷ Compare the liberal tradition, already noted, to establish the modern method of conveyancing, Rood, *loc. cit. supra* note 174. For a general treatment: Roberts, *Transfer of Future Interests* (1932) 30 MICH. L. REV. 349.

²¹⁸ Iowa: Noonan v. State Bank of Livermore, 211 Iowa 401, 233 N. W. 487 (1930); North Carolina: Brown v. Guthery, 190 N. C. 822, 130 S. E. 836 (1925); Oregon: Jerman v. Nelson, 135 Ore. 126, 293 Pac. 592 (1930); South Carolina: Rembert v. Evans, 86 S. C. 445, 68 S. E. 659 (1910). *Dicta* exist in favor of alienability in Indiana, Nebraska, Tennessee, and Texas. REST., *op. cit. supra* note 21, at Tent. D. No. 4, 132-133, nn. 16-23.

²¹⁹ Conditions have changed since Lampet's Case, 10 Co. Rep. 466, 77 Eng. Rep. 994 (1613).

²²⁰ Arkansas: Hurst v. Hilderbrandt, 178 Ark. 337, 10 S. W. (2d) 491 (1928); Connecticut: Hamilton v. Crosby, 32 Conn. 342 (1865); Illinois: DuBois v. Judy, 291 Ill. 340, 126 N. E. 104 (1920); Maine: Read v. Fogg, 60 Me. 479 (1872); Maryland: Schapiro v. Howard, 113 Md. 360, 78 Atl. 58 (1910); New Hampshire: Hayes v. Tabor, 41 N. H. 521 (1860).

²²¹ N. J. COMP. STAT. (1910); 1539, § 19.

²²² 3 SIMES, *op. cit. supra* note 57, § 714, n. 60.

²²³ Dissenting opinion of Grover, J., in Moore v. Littell, 41 N. Y. 66 (1869); *In re Robbins Estate*, 199 Pa. 500, 49 Atl. 233 (1901).

²²⁴ 3 SIMES, *op. cit. supra* note 57, § 737.

²²⁵ Especially GRAY, *op. cit. supra* note 8.

²²⁶ *Id.* at cc. 5-7. See "Communication and Study relating to Rule Against Perpetuities," prepared by Professor Richard R. Powell and Professor Horace E. White-side for the Law Revision Commission of the State of New York, LEG. DOC., *supra* note 34, at 25-47.

²²⁷ N. Y. REV. STAT. (1836) pt. II, c. 1, tit. II, art. 1, § 14. *Cf.*, however, §§ 20, 24.

²²⁸ *Id.* § 15.

²²⁹ *Id.* § 16. See also, LEG. DOC., *supra* note 34, at 48-56.

²³⁰ Although all of the writers on estates, such as Fearn and Hargrave, made brief mention of the rule against perpetuities, the first specialized treatise was the one by Lewis in 1843. The great treatises by Marsden (1883) and Gray (1886) followed. CHAPLIN, *SUSPENSION OF THE POWER OF ALIENATION* (2d ed. 1911) § 301.

²³¹ *Id.* at 177-198.

²³² Cadell v. Palmer, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1832-1833).

²³³ Notes of the Revisers, to pt. II, c. 1, tit. II, art. 1 of the REV. STAT. of 1836, FOWLER, *op. cit. supra* note 147, 1275.

²³⁴ 4 Ves. Jr. 227, 11 Ves. Jr. 112. See Note: *Sequel to Thellusson v. Woodford*, LEACH, *CASES ON FUTURE INTERESTS* (1935) 802-804.

²³⁵ Cadell v. Palmer, 1 Cl. & F. 372, 6 Eng. Rep. 956 (1832-1833).

²³⁶ 39 & 40 GBO. III, c. 98.

²³⁷ HUMPHREYS, *op. cit. supra* note 12.

²³⁸ There are several references in the notes of the revisers to Humphreys's book. In the note to sec. 39 (*supra* note 233), for example, the revisers state: "This section is adopted substantially from the work of Mr. Humphreys, to which we have before referred." The influence of Humphreys is apparent in several particulars: the use of the actual minority, the provision for a gift over if the first donee died under 21 (sec. 51 of his code), and the provisions about a permitted period of inalienability in a gift to a person for his support for life (§§ 60 and 61 of HUMPHREYS, *op. cit. supra*).

²³⁹ *Id.* note 237, 35-38.

²⁴⁰ *Id.* at 35-38, 282-301.

²⁴¹ *Id.* at 36.

²⁴² *Id.* at 35, 38.

²⁴³ *Id.* at 282.

²⁴⁴ Notes, *supra* note 233, art. I, FOWLER, *op. cit. supra* note 147, at 1279.

²⁴⁵ The note of the revisers reads: "Alienation cannot be protracted by means of mere nominees unconnected with the estate, beyond the period of two lives." Notes, *supra* note 233, art. I.

²⁴⁶ N. Y. REV. STAT. (1830) pt. II, c. I, tit. II, art. I, §§ 20, 24.

²⁴⁷ At the date of publication of the third edition of THE RULE AGAINST PERPETUITIES, Gray stated that there had been some four hundred and seventy cases in New York since the Revised Statutes on questions of remoteness. GRAY, *op. cit. supra* note 8, at 568. See report of further investigation in LEG. DOC., *supra* note 34, at 5.

²⁴⁸ *In re Wilcox* 194 N. Y. 288, 87 N. E. 497 (1909); *Walker v. Marcellus Ry.*, 226 N. Y. 347, 123 N. E. 736 (1919).

²⁴⁹ *In re Wilcox*, *supra* note 248.

²⁵⁰ *Walker v. Marcellus Ry.*, 226 N. Y. 347, 123 N. E. 736 (1919). *Cf. Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869 (1895).

²⁵¹ For example, notice the late case of *Bishop v. Bishop*, 257 N. Y. 40, 177 N. E. 302 (1931). The pattern did involve a suspension of the absolute power of alienation for too long a time (by combining the suspension caused by the trusts and by the future interests), but there was no remoteness of vesting, because the contingent future interests must be resolved within the lives of the two sons. But the court, *per Cardozo, C. J.*, held the gift invalid for remoteness, citing the *Wilcox* and *Walker* cases (*supra* note 248).

²⁵² Canfield, *supra* note 8, at 224-234; KHARAS, *Trusts and Suspension of the Power of Alienation in New York* (1936) 13 N. Y. U. LAW QUARTERLY REV. 191-215.

²⁵³ WALSH, *FUTURE ESTATES IN NEW YORK* (1931) esp. §§ 25, 35, 36.

²⁵⁴ *Cf. FOURTH SUPPLEMENTAL REPORT OF THE COMMISSION TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES* (1933) 7-18.

²⁵⁵ REST., *op. cit. supra* note 21, § 24.

²⁵⁶ 7 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1926) 232-234; 1 SIMES, *op. cit. supra* note 57, § 160.

²⁵⁷ 2 HOLDSWORTH, *op. cit. supra* note 256, at 594 *et seq.*; 4 *id.* at 416 *et seq.*

²⁵⁸ LITT. TEN. (1892) § 325; WALSH, *op. cit. supra* note 253, at 223 *et seq.*

²⁵⁹ Slater, *In Terrorem Clauses in Wills* (1936) 5 FORDHAM L. REV. 1-16.

²⁶⁰ *MacKenzie v. Trustees of Presbytery of Jersey City*, 67 N. J. Eq. 652, 61 Atl. 1027 (1905).

²⁶¹ Sanitary District of Chicago v. Chicago Title & Trust Co., 278 Ill. 529, 116 N. E. 161 (1917); Northwestern University v. Wesley Memorial Hospital, 290 Ill. 205, 125 N. E. 13 (1919).

²⁶² Los Angeles University v. Swarth, 107 Fed. 798 (C. C. A. 9th, 1901); Post v. Weil, 115 N. Y. 361, 22 N. E. 145 (1889).

²⁶³ GRAY, *op. cit. supra* note 8, at 292, n. 6, 293, n. 1. Note to Letteau v. Ellis, 10 P. (2d) 496 (Cal. App. 1932). (1932) 17 MINN. L. REV. 227-228 (the principal case, however, is *contra* to the general rule).

²⁶⁴ People v. Wainwright, 237 N. Y. 407, 143 N. E. 236 (1924); Doe *ex dem.* Freeman v. Bateman, 2 B. & Ald. 168, 106 Eng. Rep. 328 (1818). Cf. Graves v. Deterling, 120 N. Y. 447, 24 N. E. 655 (1890).

²⁶⁵ Rice v. Boston & W. R. Corp., 12 Allen (94 Mass.) 141 (1886); Nicoll v. N. Y. & E. R. Co., 12 N. Y. 121 (1854).

²⁶⁶ First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. 524 (1892). GRAY, *op. cit. supra* note 8, §§ 304-311.

²⁶⁷ 32 Hen. VIII c. 24. Furthermore, the right of reentry coupled with a reversion was thought by Gray not to violate the rule against perpetuities. GRAY, *op. cit. supra* note 8, § 303.

²⁶⁸ Niles, *Conditional Limitations in Leases in New York* (1933) 11 N. Y. U. LAW QUARTERLY REV. 15, 26; cf. opinion of Savage, C. J., in Oakley v. Schoonmaker, 15 Wend. 226 (N. Y. 1836); cf. the broad Wisconsin statute: WISC. STAT. (1925) § 291.01; Tower Building Co. v. Andrew, 191 Wisc. 269, 210 N. W. 842 (1926).

²⁶⁹ GRAY, *op. cit. supra* note 8, at 304.

²⁷⁰ Sanitary District v. Chicago Title & T. Co., 278 Ill. 529, 116 N. E. 161 (1917).

²⁷¹ 4 KENT, *op. cit. supra* note 11, at 129; 1 SIMES, *op. cit. supra* note 57, § 168.

²⁷² *Id.* § 169.

²⁷³ It was the avowed purpose of the revisers "to reduce all expectant estates substantially to the same class, and apply to them the same rules." The New York courts could easily have included rights of entry under the heading of "expectant estates," which were made freely alienable but they read back the common law. Nicoll v. New York & E. R. Co., 12 N. Y. 121 (1854). In other states similar statutes are more liberally construed: Ky. Coal Lands v. Min. Dev. Co. 295 Fed. 255 (C. C. A. 6th, 1924); Hamilton v. City of Jackson, 157 Miss. 284, 127 So. 302 (1930).

²⁷⁴ California, Connecticut, Montana, and New Jersey. REST., *op. cit. supra* note 21, at 4, Spec. Note to § 201. There is a very recent statute in Michigan: MICH. COMP. LAWS (Mason's Supp. 1933) § 12966-2. In four states statutes making transferable "any interest in or claim to real estate" will probably include powers of termination. States having such statutes are Kentucky, Mississippi, Virginia, and West Virginia. REST., *op. cit. supra* note 21, at 201, Special note.

²⁷⁵ Mass. Gen. Laws, 1887, c. 184, § 23. There are in addition to the statutes mentioned a few statutes making void frivolous restrictions on the use of land. Barrie v. Smith, 47 Mich. 130 (1881).

²⁷⁶ 8 & 9 VICT. c. 106 (1845) § 6; 44 & 45 VICT. c. 41, § 10 (1881); 1 and 2 Sec. V, c. 37 § 2 (1911).

²⁷⁷ *Re the Trustees of Hollis Hospital*, [1899] 2 C. 540.

²⁷⁸ For instance, the American courts have refused to extend the rule against perpetuities to rights of entry. GRAY, *op. cit. supra* note 8, §§ 304-310.

²⁷⁹ 4 KENT, *op. cit. supra* note 11, at 129.

²⁸⁰ *Id.* at 130, 131.

²⁸¹ Jackson *ex dem.* Blanchard v. Allen, 3 Cow. 220, 230 (N. Y. 1824); Croft v. Lumley, 6 H. L. 672.

²⁸² 4 KENT, *op. cit. supra* note 11, at 123.

²⁸³ *Id.* at 130.

²⁸⁴ Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); *In re Andrus'* Will, 156 Misc. 268, 281 N. Y. Supp. 831 (1935); Manning, *The Development of Restraints on Alienation Since Gray* (1935) 48 HARV. L. REV. 373.

²⁸⁵ Sanitary District of Chicago v. Chicago Title & Trust Co., 278 Ill. 529, 116 N. E. 161 (1917); Bredell v. Kerr, 242 Mo. 317, 147 S. W. 105 (1912); Davenport v. Queen, 3 App. Cas. 115 (1877).

²⁸⁶ Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641 (1888); South Penn Oil Co. v. Edgell, 48 W. Va. 348, 37 S. E. 596 (1900).

²⁸⁷ See Ames, *Disseisin of Chattels* (1890) 3 HARV. L. REV. 334; Maitland, *The Mystery of Seisin* (1886) 2 L. Q. REV. 481; 2 CO. LITT. 214a.

²⁸⁸ REST., *op. cit. supra* note 21, at 4, § 201, Comment.

²⁸⁹ Moore v. Sharpe, 91 Ark. 407, 121 S. W. 341 (1909); REST., *op. cit. supra* note 21, at 4, Expl. Notes to §§ 201, 113.

²⁹⁰ McKissick v. Pickle, 16 Pa. 140 (1851); Perry v. Smith, 231 S. W. 340 (Tex., 1921).

²⁹¹ REST., *op. cit. supra* note 21, at Ex. Note to §§ 201, 113, 294, 112-113, nn. 4-6.

²⁹² *Id.* 112, n. 4.

²⁹³ 4 COKE 119 b, 76 Eng. Rep. 1110 (1603).

²⁹⁴ Brummell v. Macpherson, 14 Ves. Jr. 173 (1807).

²⁹⁵ Note (1924) 31 A. L. R. 153; Note (1924) 32 A. L. R. 1080.

²⁹⁶ Aste v. Putnam's Hotel Co., 247 Mass. 147, 141 N. E. 666 (1923). *Contra*: Investor's Guaranty Corp. v. Thompson, 31 Wyo. 264, 225 Pac. 590 (1924).

²⁹⁷ Rice v. Boston & W. R. Corp. 12 Allen (94 Mass.) 141 (1866); Oakland Co. v. Mack, 243 Mich. 279, 220 N. W. 801 (1928); Note (1928) 13 MINN. L. REV. 271-273.

²⁹⁸ O'Connor v. City of Saratoga Springs, 146 Misc. 892, 262 N. Y. Supp. 809 (1933).

²⁹⁹ Sheets v. Vandallia R. Co., 74 Ind. App. 597, 127 N. E. 609 (1920); Jordan v. Hendricks, 91 Ind. App. 678, 173 N. E. 288 (1930); (1931) 31 COL. L. REV. 509; Note (1920) 7 A. L. R. 817.

³⁰⁰ CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND (1929) 148-165.

³⁰¹ In the opinion of the reporter and most of his advisers, the principle of non-transferability is a "pure anachronism." REST., *op. cit. supra* note 21, at 4, Expl. n. 114. Cf. Uniform Estates Act (5th Tent. D. 1935) § 29, Handbook, *supra* note 51, 155.

³⁰² GRAY, *op. cit. supra* note 8, §§ 299-311. In the earlier drafts of the Uniform Estates Act, rights of entry were made subject to the rule against perpetuities. (4th Tent. D. 1934) § 22, HANDBOOK, Comm. on Uniform State Laws (1934) 226. In the latest draft, however, (1935) sec. 26 reads: "Time limit on Possibilities of Reverter and Rights of Entry. Possibilities of reverter and powers of termination, that is, rights of entry for conditions broken, become void [50] years after the instruments creating them take effect." HANDBOOK, *op. cit. supra* note 51, at 154. Cf. Massachusetts statute, *supra* note 275.

³⁰³ Gray points out that the use of a condition to restrict the use of land granted in fee has been obsolete in England for almost two centuries. *Id.* at 266, n. 2.

³⁰⁴ For instance, in sec. 199 B. (3), *Rest., op. cit. supra* note 29, it is stated with simplicity and directness: "A possibility of reverter is any reversionary interest which is subject to a condition precedent." A contingent or executory interest in another is one subject to a condition precedent. *Walsh, supra* note 181.

³⁰⁵ *First Universalist Society v. Boland*, 155 Mass. 171, 29 N. E. 524 (1892); *Yarbrough v. Yarbrough*, 151 Tenn. 221, 269 S. W. 36 (1924); *Copenhaver v. Pendleton*, 155 Va. 463, 155 S. E. 802 (1930).

³⁰⁶ *Walsh, op. cit. supra* note 10, §§ 122-128 (2d ed. 1932).

³⁰⁷ *Niles, supra* note 268, at 15.

³⁰⁸ *Martin v. Crossley*, 46 Misc. 254, 91 N. Y. Supp. 712 (1905); *Burnee Corp. v. Unecda Pure Orange Drink Co., Inc.*, 132 Misc. 435, 442, 230 N. Y. Supp. 239 (1928).

³⁰⁹ *Ibid.*; N. Y. Civ. Prac. Act, § 1410 (1).

³¹⁰ Various defensive steps are possible if the landlord seeks to dispossess a tenant for other defaults, such as the nonpayment of rent (*id.* §§ 1435, 1437-1440), but none are provided to protect a holdover.

³¹¹ *Ehret Holding Corp. v. Anderson Galleries, Inc.*, 138 Misc. 722, 247 N. Y. Supp. 235 (1930), *aff'd*, 235 App. Div. 781, 256 N. Y. Supp. 978 (1932). *Accord: Jabbour Bros. v. Hartsook*, 131 Va. 176, 108 S. E. 684 (1921).

³¹² Judge Learned Hand, in distinguishing between a vested and contingent remainder said: "I am quite aware that this is all largely a matter of words, but so is much of the law of property. . . ." *Commissioner of Internal Revenue v. City Bank Farmers' Trust Co.*, 74 F. (2d) 242, 247 (C. C. A. 2d, 1934).

³¹³ *Cf. 1 SIMES, op. cit. supra* note 57, § 180, example (d).

³¹⁴ As a matter of fact, the last two cases to go to the Court of Appeals were decided against the landlords: *Beach v. Nixon*, 9 N. Y. 35 (1853); *Kramer v. Amberg*, 15 Daly 205, 4 N. Y. Supp. 613 (N. Y. 1889), *aff'd*, 115 N. Y. 655, 21 N. E. 1119 (1889). The late case, *Murray Realty Co. v. Regal Shoe Co.*, 265 N. Y. 332, 193 N. E. 164 (1934), is distinguishable inasmuch as the landlord had no election.

³¹⁵ *SANDERS, USES AND TRUSTS* (1st ed. 1791) (1855 ed.) 208-209.

³¹⁶ *GRAY, op. cit. supra* note 8 (3d ed. 1915) §§ 31-41.

³¹⁷ For a complete discussion and marshalling of authorities, see *Powell, Determinable Fees* (1923) 23 COL. L. REV. 207.

³¹⁸ *Id.* at 212-220.

³¹⁹ *CO. LITT.* 18a, 27a.

³²⁰ 2 BL. COMM. 109.

³²¹ 4 KENT, *op. cit. supra* note 11, at 9-11.

³²² *Powell, supra* note 317, at 210; for a more complete list of cases, see 1 *SIMES, op. cit. supra* note 57, § 178, n. 10.

³²³ *City National Bank v. City of Bridgeport*, 109 Conn. 529, 147 Atl. 181 (1929) (construed a condition subsequent—property conveyed for church purposes in 1805); *Battistone v. Banulski*, 110 Conn. 267, 147 Atl. 820 (1930) (property conveyed in 1859 for "so long as said District shall occupy the same for school purposes").

³²⁴ 1 *SIMES, op. cit. supra* note 57, § 178, n. 10.

³²⁵ 2 *id.* at § 507.

³²⁶ Sec. 200, *REST., op. cit. supra* note 21, at 4, states that possibilities of reverter, like reversions, are alienable. Two advisers dissent. See *id.* Ex. Notes, Appendix, § 200, 107-112. The few cases are divided, 3 *SIMES, op. cit. supra* note 57, § 715, n. 64. All

concede that possibilities of reverter were not alienable at the common law, and are not so clearly alienable today even as contingent remainders. *Magness v. Kerr*, 121 Ore. 373, 254 Pac. 1012 (1927); *Yarbrough v. Yarbrough*, 151 Tenn. 221, 269 S. W. 36 (1924).

³²⁷ The terms "right of entry" and "possibility of reverter" are often used interchangeably by the courts. Cf. Statement of Dean Fraser, *RESTR., EXPL. NOTES* to sec. 200, *supra* note 326.

³²⁸ *Supra* note 305.

³²⁹ 2 *SIMES*, *op. cit. supra* note 57, § 507.

³³⁰ In the Restatement, future estates are spoken of as being "reversions," or "possibilities of reverter," or "powers of termination," or "remainders," or "executory interests." The arrangement followed, in considering the characteristics of each type of future estate in the same subdivision of the work, should hasten the elimination of purely historical distinctions.

³³¹ Even Gray, in his later editions, seems to doubt whether the possibility of reverter should be subject to the rule against perpetuities. *GRAY, op. cit. supra* note 8, § 312 n. 7. That is, Gray thought that possibilities of reverter should not be permitted because they involved perpetuities, but if possibilities of reverter were to be permitted, remote possibilities became necessities. Powell, in his article, *supra* note 317, tends to minimize the evil by pointing out that extreme cases do not often arise. Simes would apparently hold the possibility of reverter to be subject to the rule if the question were an open one. 2 *SIMES, op. cit. supra* note 57, § 507. Cf. § 26 Uniform Estates Act, *supra* note 302.

³³² If an estate may shift from one charity to another at a remote time in the future without violating the rule against perpetuities [*Christ Hospital v. Grainger*, 1 M. & G. 460, 41 Eng. Rep., 1343 (1849)], it is perhaps reasonable that the estate should revert after the failure of a charitable trust. Gray thought that a resulting trust after the failure of a charity could be distinguished from a possibility of reverter. *GRAY, op. cit. supra* note 8, § 418.

³³³ *Id.* §§ 268-278.

³³⁴ *HUMPHREYS, op. cit. supra* note 12, at 55.

³³⁵ *WALSH, op. cit. supra* note 10, § 115; cf. *Sergeant v. Steinberger*, 2 Ohio 305 (1825).

³³⁶ Humphreys wrote in 1827 (*op. cit. supra* note 12, at 55) ". . . And from the decay of tenures and its repugnancy to natural justice, as placing property on a chance, and depriving the creditors and the families of the owners first dying of their just claims, it [the *jus accrescendi*] is now less favored than formerly."

³³⁷ For example, consider the pattern in the Pennsylvania case of *Arnold v. Jack's Executors*, 24 Pa. 57 (1854).

³³⁸ *Phelps v. Jepson*, 1 Root 48 (Conn. 1769).

³³⁹ Judge Swift, 1 *Swift Syst.* 272, quoted, *Whittlesey v. Fuller*, 11 Conn. 337, 340 (1836). Cf. *Houghton v. Brantingham*, 86 Conn. 630, 86 Atl. 664 (1913).

³⁴⁰ *Sergeant v. Steinberger*, 2 Ohio 305 (1825).

³⁴¹ *Wilson & March v. Fleming*, 13 Ohio 68 (1844).

³⁴² *Equitable Loan etc. Co. v. Waring*, 117 Ga. 599, 676, 44 S. E. 320 (1903).

³⁴³ *North Carolina* in 1784, *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202 (1895); *Virginia* in 1787, 1 VA. LAW REG. 625, note to VA. CODE (1930) § 5159; *Kentucky* in

1796, note to Ky. STAT. (Carroll, 1930) § 2348 [but see *Osborne v. Hughes*, 219 Ky. 116, 292 S. W. 748 (1927)]; Alabama in early history of the state, *First Nat. Bank v. Lawrence*, 212 Ala. 45, 101 So. 663 (1924); Pennsylvania in 1812, *Arnold v. Jack's Executors*, 24 Pa. 57 (1854); Illinois in 1821 [but see *Svenson v. Hanson*, 289 Ill. 242, 124 N. E. 645 (1919)].

³⁴⁴ In New York in 1786. 4 KENT, *op. cit. supra* note 11, at 361. The first statute in Massachusetts in 1783 recited that survivorship as it existed in the common law was found by experience to work great injustice, and that the reasons upon which it was founded had long ceased to exist, and therefore "the said principle of survivorship shall no longer be in force in this commonwealth." MASS. STAT. (1783) c. 52 § 4. But this act was repealed two years later and the original statute was passed which established a presumption in favor of the creation of a tenancy in common unless a joint tenancy was expressly provided for. MASS. STAT. (1785) c. 62 § 4; *Hoag v. Hoag*, 213 Mass. 50, 99 N. E. 521 (1912). Illinois had the same experience. The 1821 statute abolishing survivorship was amended in 1827 to permit survivorship when expressly called for. *Svenson v. Hanson*, 289 Ill. 242, 124 N. E. 645 (1919); cf. *Osborne v. Hughes*, 219 Ky. 116, 292 S. W. 748 (1927). Also cf. 1 VA. LAW REG. 625. New Jersey statute of 1812 also created a presumption in favor of a tenancy in common. NIX. DIG. 34. This pattern is now overwhelmingly the more common one. STIMSON, *op. cit. supra* note 25, § 1371 (b).

³⁴⁵ LITTLETON, TENURES (1592) § 292.

³⁴⁶ *Pegg v. Pegg*, 165 Mich. 228, 130 N. W. 617 (1911). But a statute in Michigan reads: "Estates . . . are divided into estates in severalty, in joint tenancy, and in common: the nature and properties of which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter." MICH. COMP. LAWS (1929) § 12963.

³⁴⁷ *Deslauriers v. Senesac*, 331 Ill. 437, 163 N. E. 327 (1928); see cases in accord cited in Note (1932) 18 CORN. L. Q. 284, n. 3.

³⁴⁸ Cf. *Menendez v. Rodriguez*, 106 Fla. 214, 143 So. 223 (1932).

³⁴⁹ *In re Klatzl*, 216 N. Y. 83, 110 N. E. 181 (1915). Accord, *Boehringer v. Schmid*, 133 Misc. 236, 232 N. Y. Supp. 360 (1928), *aff'd*, 254 N. Y. 355, 173 N. E. 220 (1930). *In re Klatzl*, *supra*, criticized in Note (1932) 18 CORN. L. Q. 284, 286 ff. Now by statute in a few states, a conveyance may be made by one person to himself and another jointly. *Id.* at 285, n. 15. Cf. also CALIF. STAT. (1929) § 683. See *esp. Ames v. Chandler*, 265 Mass. 428, 164 N. E. 616 (1929), and *In re Vandergrift's Estate*, 105 Pa. Super. 293, 161 Atl. 898 (1932).

³⁵⁰ Dissenting opinion (majority on this point) *In re Klatzl*, 216 N. Y. 83, 110 N. E. 181 (1915).

³⁵¹ TIFFANY, REAL PROPERTY (2d ed. 1920) § 191, n. 20, § 194, n. 18. Notes (1914) 28 HARV. L. REV. 631; (1915) 29 *id.* at 201.

³⁵² Cf. opinion of Collins, J., *In re Klatzl*, 216 N. Y. 83, 89, 110 N. E. 181, 185 (1915).

³⁵³ Pa. Act of March 31, 1812.

³⁵⁴ *Arnold v. Jack's Exec.* 24 Pa. 57 (1854).

³⁵⁵ *Redemptorist Fathers v. Lawler*, 205 Pa. 24, 54 Atl. 487 (1903). Accord: *Equitable Loan Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 353 (1903). Cf. *Houghton v. Brantingham*, 86 Conn. 630, 86 Atl. 664 (1913).

³⁵⁶ As in Kansas, *Malone v. Sullivan*, 136 Kan. 193, 14 P. (2d) 647 (1932); and probably in Illinois, *Illinois Trust & Savings Bank v. Van Vlack*, 310 Ill. 185, 141 N. E. 546 (1923) [especially a recent statute has clarified the law in Illinois: ILL. REV. STAT. (Cahill, 1933) c. 76, 2]. Further, in a state like Connecticut where survivorship has never existed, *supra* note 339, a statute permits a bank to pay "either or survivor." CONN. GEN. STAT. (Rev. of 1930) § 3986.

³⁵⁷ *Supra* notes 354 and 355. *Mardis v. Steen*, 293 Pa. 13, 141 Atl. 629 (1928).

³⁵⁸ First Nat. Bank v. Lawrence, 212 Ala. 45, 101 So. 663 (1924); *Equitable Loan etc. Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 353 (1903); *Illinois Trust & Savings Bank v. Van Vlack*, 310 Ill. 185, 141 N. E. 546 (1923); *Burns v. Nolette*, 83 N. H. 489, 144 Atl. 848 (1929).

³⁵⁹ *Malone v. Sullivan & Williams*, 136 Kan. 193, 14 P. (2d) 647 (1932); *Deal's Adm'r. v. Merchants Bank*, 120 Va. 297, 91 S. E. 135 (1917); *Wisner v. Wisner*, 82 W. Va. 9, 95 S. E. 802 (1918).

³⁶⁰ Concurring opinion of Cardozo, C. J., in *Moskowitz v. Marrow*, 251 N. Y. 380, 167 N. E. 506 (1929); dissenting opinion of Thompson, J., in *Illinois Trust & Savings Bank v. Van Vlack*, 310 Ill. 185, 141 N. E. 546 (1923), and cases there cited.

³⁶¹ For instance, consider how unreal it is to apply the rules about the four unities. Cf. *Appeal of Garland*, 126 Me. 84, 136 Atl. 459 (1927); *Burns v. Nolette*, 83 N. H. 489, 144 Atl. 848 (1929).

³⁶² For instance, the New York statute as construed by the Court of Appeals in *Moskowitz v. Marrow*, 251 N. Y. 380, 167 N. E. 506 (1929). See also the California statutes, CALIF. GEN. LAWS (1931), Act. 652, 15a, and the 1935 amendment to § 683 of the CIVIL CODE, Stat. & Amendment to the CODE, 1935, c. 234. The present statute in Maine, probably because of the *Appeal of Garland*, *supra* note 361, provides that a bank account, or building and loan shares of not over three thousand dollars held in the names of two or more or survivor, will pass to the survivor, even though the intention is testamentary, and whether or not a technical joint tenancy was in law or fact created. MAINE REV. STAT. (1930) 897, § 25 (c).

³⁶³ *Supra* notes 358 and 359.

³⁶⁴ *Whittlesey v. Fuller*, 11 Conn. 337 (1836); *Wilson & March v. Fleming*, 13 Ohio 68 (1844).

³⁶⁵ *Holmes v. Holmes*, 70 Kan. 892, 79 P. 163 (1905); *Wilson v. Wilson*, 43 Minn. 398, 45 N. W. 710 (1890).

³⁶⁶ *Robinson*, Appellant, 88 Me. 2 (1895). Accord: *Lawler v. Byrne*, 252 Ill. 194, 96 N. E. 892 (1911); *Clark v. Clark*, 56 N. H. 105 (1875); *Thornley v. Thornley*, [1893] 2 Ch. 229.

³⁶⁷ *Kerner v. McDonald*, 60 Neb. 663, 84 N. W. 92 (1900); *Helvie v. Hoover*, 11 Okla. 687, 69 Pac. 958 (1902).

³⁶⁸ *Kerner v. McDonald*, *supra* note 367.

³⁶⁹ 1 TIFFANY, *op. cit. supra* note 351, § 195.

³⁷⁰ *Menendez v. Rodrigues*, 106 Fla. 214, 143 So. 223 (1932); *Shaw v. Hearsey*, 5 Mass. 521 (1809); *Shulz v. Ziegler*, 80 N. J. Eq. 199, 83 Atl. 968 (1912); *Bertles v. Nunan*, 92 N. Y. 152 (1883); *Odum v. Russell*, 179 N. C. 6, 101 S. E. 495 (1919); *Thornton v. Thornton*, 3 Rand. (24 Va.) 179 (1825).

³⁷¹ LITT, *op. cit. supra* note 345, §§ 288, 292; 4 KENT, *op. cit. supra* note 11, at 359 *et seq.*

³⁷² 4 KENT, *op. cit. supra* note 11, at 359, n. 1.

³⁷³ 2 BL. COMM. 182; 4 KENT, *op. cit. supra* note 11, at 363.

³⁷⁴ 1 TIFFANY, *op. cit. supra* note 351, at 652, 726-730.

³⁷⁵ Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337 (1895).

³⁷⁶ Thornly v. Thornly, [1893] 2 Ch. 229; *Re Wilson & T. I. Electric Light Co.*, 20 Ont. Rep. 397 (1891).

³⁷⁷ *Supra* note 366; Note (1895) 30 L. R. A. 305, 314-317.

³⁷⁸ Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695 (1887); Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337 (1895).

³⁷⁹ Buttlar v. Rosenblath, *supra* note 378.

³⁸⁰ *Ibid.* Cf. Tuttle v. Everhot Heater Co., 264 Mich. 60, 249 N. W. 467 (1933).

³⁸¹ Chandler v. Cheney, 37 Ind. 391 (1871); Cole Mfg. Co. v. Collier, 95 Tenn. 115, 31 S. W. 1000 (1895).

³⁸² *In re Meyer's Estate*, 232 Pa. 89, 81 Atl. 145 (1911); Annapolis Banking & Trust Co. v. Smith, 164 Md. 8, 164, Atl. 157 (1933); Hertz v. Mills, 166 Md. 492, 171 Atl. 709 (1934); Banker's Trust Co. of Detroit v. Humber, 264 Mich. 71, 249 N. W. 454 (1933).

³⁸³ Beihl v. Martin, 236 Pa. 519, 84 Atl. 953 (1912).

³⁸⁴ Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824 (1886); First Nat. Bank of Durham v. Hall, 201 N. C. 787, 161 S. E. 484 (1931).

³⁸⁵ Licker v. Gluskin, 265 Mass. 403, 164 N. E. 613 (1929).

³⁸⁶ Palmer v. Treasurer, 222 Mass. 263, 110 N. E. 283 (1915). See various views in *In re Klatzl*, 216 N. Y. 83, 110 N. E. 181 (1915). *Contra*, however, Tyler v. United States, 281 U. S. 497, 50 Sup. Ct. 356 (1930), noted in (1930) 16 CORN. L. Q. 114.

³⁸⁷ Matter of Dunn, 236 N. Y. 461, 141 N. E. 915 (1923); Commissioner of Int. Rev. v. Fletcher Sav. & Trust Co., 59 Fed. (2d) 508 (C. C. A. 7th, 1932), noted (1932) 18 CORN. L. Q. 121; Cahn v. United States, 10 F. Supp. 577 (Ct. Cl. 1935), noted in (1935) 13 N. Y. U. LAW QUARTERLY REV. 136 (1935).

³⁸⁸ In the third Tentative Draft (1933) of the Uniform Estates Act, § 6 provided:

"Estates May be Several or Joint. An estate may exist, or be created in one person or in joint ownership in two or more persons; but except when the joint owners are trustees or partners, joint ownership shall not have the constituent characteristics of tenancy in common and not those of joint tenancy under the Common Law."

In 1934, however, the Conference voted "to allow joint-tenancy or tenancy by the entireties, if a creating instrument reveals such a desire." HANDBOOK, COMM. ON UNIFORM STATE LAWS (1934) 220, Note to § 5. Sec. 4 of the 5th Tent. D. (1935) provides:

"Estates May be Several or Joint. An estate may exist, or be created in one person or in joint ownership in two or more persons; but except when the joint owners are cotrustees (or partners) or where the intent to create a joint tenancy or a tenancy by entireties and not a tenancy in common is expressed in the creating instrument, joint ownership shall have the constituent characteristics of tenancy in common." HANDBOOK, *op. cit. supra* note 51, at 148.

³⁸⁹ The latest draft of the Uniform Estates Act, *op. cit. supra* note 34, at 147, 157, although not ready for adoption, seems to be definitely in the right direction. The policy of the Committee in presenting recommended changes in groups instead of proposing many separate remedial laws also seems commendable. Report of the Committee on the Uniform Estates Act. HANDBOOK, *op. cit. supra* note 51, at 145-146.

AMERICAN BUSINESS ASSOCIATION LAW A HUNDRED YEARS AGO AND TODAY

E. MERRICK DODD, JR.

INTRODUCTION

THE law of business associations existing in any society is largely conditioned by the economic system prevailing therein. Communities devoted exclusively to agriculture and handicraft industry find little need for the business association, and little reason for developing legal principles to govern its activities. On the other hand, an active commerce and an industry conducted largely by the use of mechanical power, together with the complicated systems of transportation and finance which such commerce and industry necessitate, call for the assembling of larger aggregations of capital than are normally possessed by single individuals, and, unless the State itself assumes the entrepreneur function, require some highly developed forms of private associations of individuals to carry them on.

During the fifty years that followed the establishment of American independence, the United States, although remaining predominantly an agricultural community, rapidly developed, under the stimuli furnished by political separation from England,¹ by the uninviting character of most of its northeastern section for the pursuit of agriculture, and by the progress of mechanical invention, a very substantial amount of internal and external commerce and of factory-organized manufacture. Shipping grew apace and, particularly on inland waters, began to make use of steam as a method of propulsion. Roads and bridges multiplied, many canals were built and more projected, and

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toward the end of the period the first short railroads were constructed and were with some hesitation substituting the locomotive for the horse as their mode of traction.² Manufacturing, after the turn of the century, tended more and more, particularly in New England and the Middle Atlantic states, to pass from the home and the small shop to the factory,³ and, in the case of some of the Massachusetts cotton mills, to assume the form of relatively large-scale industry.⁴ This growing commerce and industry was supplied with credit by several hundred banking institutions,⁵ and its ships, stores, and factories were provided with insurance by an almost equally large number of insurance companies.⁶

Apart from building a few roads, bridges, and canals,⁷ and furnishing a portion of the capital of a few of the banks⁸ and other institutions, the federal and state governments left the financing of this commercial development entirely to private citizens. In an era when large individual fortunes were exceedingly rare, this meant that some form of business association which should combine the financial resources of a number of persons was essential, at least for the larger enterprises. Under these circumstances the partnership, a form of association requiring no legislative authorization, came into widespread use and had, by 1841, achieved such practical importance as to cause Justice Story to select partnership as the subject of the second of his treatises on commercial law.⁹

In thus making increased use of the partnership mode of doing business, American merchants and manufacturers were merely following in the footsteps of their English prototypes, among whom that form of association had developed rapidly during the late eighteenth and early nineteenth centuries. On the other hand, whether because of the peculiar need felt for encouraging men to combine their resources in a new and financially poor country, or because of the greater influence which the commer-

cial classes were able to exert over American state legislatures than that which English business men had over a pre-reform-bill Parliament,³⁰ or for other reasons, corporate charters for business enterprises, sparingly granted in England during the period from the Bubble Act of 1720 to the Companies Act of 1855, were from 1780 onward rather freely distributed in the United States, first for the building of turnpikes, bridges, and canals and the carrying on of banking and insurance, from about 1809 onward for the conduct of the larger manufacturing enterprises,³¹ and from about 1830 for the construction and operation of railroads.³² Thus by 1835 the corporate as well as the partnership form of business association was firmly established in the United States.

Substantial bodies of case law relating to both types of association had already come into existence by that time, but to one who examines this case law with the perspective given by a hundred years of subsequent development, there is marked contrast between its two component parts. Owing partly to the high state of development which partnership law had attained under Lord Chancellor Eldon and his contemporaries, and partly to the gradual decline of the partnership as a major factor in our commercial life, the growth of partnership law during the last hundred years has been so slight that a lawyer of today, reading Story's account of that law written nearly a century ago, feels himself on familiar ground. On the other hand, a modern corporation lawyer turning the pages of the only American corporate treatise of that period, Angell and Ames's *Treatise on the Law of Private Corporations Aggregate*, published in 1832, or even the second edition of that work published eleven years later, finds many of the basic rules of business-corporation law as he knows it either wholly undeveloped or existing only in embryo. An examination of the corporation statutes which were in effect in 1835 in such states as Massachusetts and New York does, in-

deed, considerably modify this impression of the immaturity of the then existing corporation law—legislatures having anticipated and provided for a number of situations with which the courts had not yet had occasion to deal—but it remains true that, unlike the law of partnership, the law of business corporations has undergone a tremendous evolution during the last century.¹³

PARTNERSHIPS

Although there is a brief chapter on partnership law in the third volume of Chancellor Kent's *Commentaries on American Law*, which was published in 1828, the first comprehensive treatment of that law in America is contained in Story's *Commentaries on the Law of Partnership*, published in 1841. By that time English partnership law had, from being merely the custom of a few foreign merchants in London, evolved into a substantial body of legal precedents which had already been analyzed and systematized by no less than five English text writers.¹⁴ Developing somewhat later than in England, the American case law of partnership had already assumed substantial proportions, though for the most part the American cases involved the acceptance by our courts of principles already worked out in England rather than the establishment of any conflicting American doctrines or the breaking of important new ground.¹⁵

The first hundred pages of Story's treatise deal chiefly with the tests for determining the existence of a partnership either as between its members or with respect to third persons. Here the law with regard to cases not involving liability to creditors had already assumed substantially its modern guise, although the length to which landlords and creditors might go in sharing both profits and control without being viewed by the law as coadventurers with their tenants or debtors had not been fully explored. In cases relating to such liability, on the other hand,

the courts were still wrestling with the eighteenth-century English doctrine that sharing in the profits of an enterprise normally creates partnership liability for its debts.¹⁶ Here the law was to undergo a radical modification in both countries as the result of the case of *Cox v. Hickman*,¹⁷ in which the House of Lords astonished the profession by asserting that persons not partners as between themselves are not under any circumstances subject to partnership liabilities in the absence of estoppel. This new rule quickly found favor with the majority of American courts and, through its embodiment in the Uniform Partnership Act,¹⁸ has now been established, in theory at least, in most of the jurisdictions, like New York, in which the courts had persisted in adhering to the older tradition.

This newer approach has unquestionably increased the tendency to permit a capitalist to combine a considerable measure of control over a business with a sharing in its profits without becoming responsible for its debts, but it may be questioned whether, in an age that tends to exalt the functional rather than the dialectical approach to legal problems, courts can be induced even by legislative enactment to decide the question of whether a man's relation to a business is such that he should be held liable for its debts solely by asking themselves how they would decide some entirely different issue.

Turning from the tests for determining the existence of a partnership to the powers of a partner, we find that most of the important questions as to the scope of a partner's powers had already been decided. Broad power to make business contracts and to apply firm assets to the payment of firm debts had been recognized—including power, if the firm was engaged in trade, to issue negotiable instruments.¹⁹ On the other hand, power to agree to arbitration and power to act as surety had been definitely denied, and power to make a general assignment had been

doubted.²⁰ American courts were already tending to relax the English rule denying the power to execute sealed instruments,²¹ a process finally completed by the abolition of the old rule in the Uniform Act.²²

The law of partnership property was much as we know it today, though the relation of the Statute of Frauds to partnership interests in land had not been explored. The baneful effects of the English theory that a partner's interest in the firm could be attached by his individual creditor were already becoming apparent, and some attempt had been made by the courts to mitigate the effect of this doctrine upon the rights of the other partners and the firm creditors.²³ Abolition, not mitigation, of the rule was, however, the thing needed, and only modern legislation has accomplished this reform.²⁴

The doctrine that the relationship between partners is fiduciary in character was already thoroughly established and had been applied in a considerable variety of situations.²⁵ The procedural rules governing suits between partners, including their normal disability to sue one another at law with respect to firm matters, had assumed substantially their present form,²⁶ and procedure with respect to actions by and against third persons was also nearly identical with that which still exists in states which have not enacted statutes permitting suits against a single partner or against the firm as an entity.²⁷

Changes in the firm personnel were treated much as, apart from statute, they are today,²⁸ and dissolution then, as now, brought about an accounting between the partners or between the survivor and the personal representative of the deceased which proceeded much as at present, though the law with respect to the effect of dissolution on firm good will was in a somewhat rudimentary stage.²⁹ The relative rights of firm and individual creditors in case of insolvency had been worked out to a large

extent by the English bankruptcy courts, which had established the priority of firm creditors in firm assets and of individual creditors, with certain important exceptions, in individual assets, and, in the absence of any American bankruptcy law, our courts of equity were tending to adopt these rules.³⁰ The subsequent enactment of the Federal Bankruptcy Act³¹ has left the primary rules substantially unchanged, though the Act has done away with most of the exceptions to the separate creditors' preference and, by its partial adoption of the entity view of partnership, has introduced some troublesome new problems.³²

The preference in firm assets thus given to firm creditors is a precarious advantage if it can be destroyed by action of the partners taken after insolvency but before the institution of legal proceedings for liquidation. The doctrine of *Ex parte Ruffin*,³³ that firm creditors' rights are derived from the so-called partners' lien and are destroyed by any nonfraudulent action by which those partners' liens are surrendered, was already well established in 1835,³⁴ but the question of when the attempted surrender of liens by insolvent partners should be deemed fraudulent, which gives rise to much conflict of opinion at the present time, had not then arisen.

Viewing the subject as a whole, it may fairly be said that, although some important new problems have arisen, substantial changes in traditional doctrines have been few,³⁵ even in states which have adopted the reforms embodied in the Uniform Partnership Act.³⁶

OTHER UNINCORPORATED ASSOCIATIONS

Although there appear to be no American cases decided prior to 1835 relating to unincorporated joint-stock associations, such companies undoubtedly then existed to some extent and are referred to by Story as a special form of partnership.³⁷ The subse-

quent adoption of this type of organization by the leading express companies, following the enactment of a New York statute permitting such bodies to sue and be sued in the names of their presidents,³⁸ gave it for a time considerable practical importance, but the increasing ease with which associations may incorporate has so discouraged the use of this unincorporated substitute as to make it almost obsolete except in the modified form of the business trust.

The trust device as a method of carrying on a business beneficially owned by a number of persons seems first to have been made use of in Massachusetts as a method of financing real-estate developments, incorporation for that purpose being until recently generally impossible³⁹ and the rules of conveyancing law making legal ownership of the property by a large body of shareholders impracticable.⁴⁰ The writer has found no evidence of its use as early as 1835, but, once established in Massachusetts for the management and development of real estate, it gradually came to be adopted for other types of enterprise, particularly after the courts of that Commonwealth had enunciated the principle that shareholders in such a trust were exempt from personal liability unless substantial powers of control were vested in them. The increasing tendency during the early years of the nineteenth century to impose special taxes upon corporations brought this Massachusetts trust to the attention of lawyers in other states, but, although the majority of courts adopted the friendly attitude of the Massachusetts judiciary toward it, state and federal legislatures soon proceeded to class it with the corporation for tax and regulatory purposes.⁴¹ The result has been that this form of organization, heralded a few years ago as destined largely to supplant the corporation, has continued to play only a minor role in the field of associated business enterprise.⁴²

Another unincorporated limited-liability device, the *société*

en commandite as the French call it, a form of organization containing both ordinary general partners and special partners who, by surrendering all right of control over the enterprise, obtain immunity from personal liability, had long existed on the continent of Europe and was introduced into Louisiana as part of the French commercial law.⁴³ By 1835 it had also been provided for by statute in at least two Northern states.⁴⁴ These statutes have since been generally imitated elsewhere, but the tendency of both legislatures and courts to make an almost literal compliance with the statutes a *sine qua non* of limited liability under them, and the possibility, after *Cox v. Hickman*, of obtaining much the same results through labeling the profit sharer a creditor, together with the increasing ease with which limited liability might be obtained through incorporation, have prevented the limited partnership from coming into general use in this country. The recent adoption by many states of the more reasonable provisions of the Uniform Limited Partnership Act⁴⁵ with respect to the circumstances under which liability is imposed upon the special partner has come too late to interest American business men in the possibilities of this European substitute for the small corporation.

BUSINESS CORPORATIONS—INTRODUCTION

The business organizations already dealt with, with the exception of the almost negligible limited partnership, are formed by private agreement and are dealt with by the courts on common-law principles without important statutory modifications. Corporations, on the other hand, exist only by express authorization from some organ of the State which, in England, may be either the King or Parliament, but in this country must be a state or federal legislature.⁴⁶ It is true that in England a kind of common law applicable to royal charter corporations had

been developed prior to the American Revolution, but, as few of the cases dealt with private and even fewer with business corporations, this law was of limited usefulness for American business enterprises except in familiarizing lawyers with certain generalized notions as to the nature and mode of action of corporate bodies.⁴⁷ For us, every corporation begins with a statute and may be made as different from other incorporated bodies as its legislative creator sees fit. Thus, despite the tendency of our legislatures to leave many gaps in their statutes of incorporation for the courts to fill by decision, one can no more write an adequate description of our corporation law either as it existed in 1835 or as it exists today by confining one's attention to decided cases than one can adequately describe a house by beginning at the second story, although our text writers, beginning with Angell and Ames, have uniformly attempted to do so.

Unfortunately, in 1835 and earlier, most corporations were formed by special acts of legislation, and thus no complete description of such corporations is possible without dealing with a myriad of separate and diverse enactments. The situation is not, however, quite as bad as might appear, for legislatures, even though inclined on occasion to grant special favors to influential persons in the form of peculiarly liberal charters,⁴⁸ tended in the main to standardize the statutory charters given to each of the common types of business enterprise, and the similarity of the business and public needs involved produced considerable likeness between the statutes of the different states. Furthermore, in some of the more important commercial states, such as Massachusetts and New York, there developed during this period a practice of enacting general laws relating to some of the more important classes of corporations, the provisions of which were, unless otherwise stated, to be applicable to all corporations of that class subsequently formed by special act. A fairly accurate

picture of the statutory corporation law of those two states in 1835 may thus be obtained by a survey of their general corporation laws, supplemented by some slight consideration of the special acts. Both limitation of space and lack of knowledge on the part of the writer make it necessary, in this article, to confine the account of the early statutes to those two states,⁴⁹ but it is believed that, except for an overemphasis on the importance of general rather than special acts, the picture thus presented is fairly illustrative of conditions then existing throughout the country.⁵⁰

EARLY MASSACHUSETTS CORPORATION STATUTES

The Massachusetts Revised Statutes of 1836 contain provisions for the incorporation of no less than eight different types of business organizations: corporations formed by tenants in common of real estate, aqueduct corporations, turnpikes, railroads, canals, banks, insurance companies, and manufacturing companies.⁵¹ The first two statutes, enacted, respectively, in 1783⁵² and 1799,⁵³ were general incorporation acts in the modern sense, in that they enabled individuals to incorporate themselves by doing certain prescribed acts. Under the first statute, any five or more tenants in common were permitted to incorporate merely by applying to a justice of the peace for the calling of a meeting at which they were to choose a clerk, treasurer, collector, and such committees and other officers as they should think necessary. Provision was made for by-laws, for future meetings and voting thereat, for the adoption of measures for managing or dividing the common property, and for assessment and forfeiture of shares. Under the Aqueduct Act, any persons already associated or who should by agreement in writing associate as proprietors of an aqueduct might in similar fashion form a corporation empowered to hold a limited amount of real estate and to lay pipes in highways with

the consent of the local authorities. The members of these aqueduct corporations were to be personally liable for the debts of the enterprise.

The other acts did not do away with the necessity of a special act of incorporation but were general only in the sense that they were, unless otherwise stated, to be incorporated by reference in all special charters subsequently granted for the type of corporation in question. The earliest of them, the Turnpike Act, adopted in 1804 and substantially unchanged in 1835,⁵⁴ was more concerned with the public-service character of these enterprises and with the tolls which they should charge than with corporate organization, which was left largely to the determination of the members. Neither the general act nor the individual charters fixed the amount of the capital or required any initial payments, though the general act provided for sale of the shares of members who should fail to pay assessments.⁵⁵

The numerous charters granted to toll-bridge corporations were in general not very different from those of turnpike companies, but no general act was ever passed and there was considerable variation among the charters of different companies. Many of them contained limitations on the voting rights of large shareholders, a provision not found in the Turnpike Act.⁵⁶

The Canal Corporations Act⁵⁷ dealt with the operation of the canal business rather than with corporate organization, which continued to be regulated by the special charters. Particularly in the case of the larger undertakings, the capital structure and internal management of the canal companies were generally prescribed to a greater extent than in the case of either turnpikes or toll bridges. Authorized capital and par value were generally fixed, sometimes with a provision for the issue of such number of additional shares as might be needed to complete the project. Voting rights of large shareholders were usually limited, and

management by a board of directors was sometimes required.⁵⁸

The early railroad charters were much like the later canal charters, but by 1835 an elaborate general railroad act had been adopted.⁵⁹ That act provided for the management of railroad corporations by boards of directors and officers appointed by them. Voting was to be by shares, except that no one shareholder could exercise more than one tenth of the voting power. Shares were to be transferable only on the books of the corporation and were to be assessable up to their value as fixed in the charter or by vote of the shareholders. Delinquent shareholders were to be personally liable if their shares could not be resold for an amount equal to the unpaid assessments.

The notes of incorporated banks were at that time the principal form of currency, and the Bank Corporation Act of 1829⁶⁰ evinced much solicitude for the solvency of these institutions and the protection of their noteholders and other creditors. No bank was permitted to engage in business until a public official had counted in its vaults gold or silver coin equal to one half its authorized capital and its directors had made oath that the coin so counted belonged exclusively to the bank. No shareholder could borrow from the bank until his subscription had been paid, and no shares could be transferred until the entire capital had been paid. Loans, bank bills, and other debts were not to exceed a certain ratio to capital, and directors were made personally responsible in case these limits were overstepped. Shareholders were made liable for double the amount of their shares for loss of capital due to mismanagement by the directors and were made liable in full for the redemption of bank bills on expiration of the charter.⁶¹ No shareholder was permitted to have more than ten votes or to own more than one half of the stock. Directors, who were given substantial managerial powers, were required to be shareholders and residents of Massachusetts and were not to

be members of the board of more than one bank. Inspection by legislative committees and annual reports to the secretary of the Commonwealth were provided for, and the Commonwealth was given the right to subscribe to one half of any bank's capital and also to borrow from any bank an amount equal to one tenth of its capital. The Act also contained special provisions relating to savings banks, but these were mutual and not stock corporations.

The General Insurance Corporation Act, adopted in 1819 and radically amended thirteen years later,⁶² also contained detailed provisions with respect to corporate organization and important safeguards for creditors. Insurance corporations were to be managed by directors who were to be shareholders and residents of Massachusetts. They were to be chosen by the shareholders, who were to vote by shares, with a maximum of thirty votes permitted to any one person. The directors were required to make triennial reports to the shareholders, to publish certain less detailed annual reports, and to make financial statements to the legislature when called for. The authorized capital was to be paid within twelve months of the granting of the charter, and the manner of its investment was prescribed. No single policy might exceed ten per cent of the paid-in capital. Shareholders were to be liable for losses to the extent of the amount unpaid on their shares.

This statute was applicable only to stock corporations, but an act of 1835 also established rules governing mutual fire-insurance companies.⁶³ Acts of 1826 and 1832 regulated the doing of business in the Commonwealth by agents of foreign insurance companies, such business being prohibited unless a foreign company had a paid-in capital of \$200,000 and unless the amount of its individual policies was restricted by law to one tenth of its capital.⁶⁴

Until 1830 the Massachusetts legislature, although quite ready

to grant corporate charters to manufacturing enterprises, insisted on imposing unlimited liability on their shareholders. Perhaps for that reason it did not up to that time show much concern about the capital structure or the internal organization of such corporations. The act of 1830,⁶⁵ which was to be applicable to all manufacturing corporations thereafter chartered, conferred the privilege of limited liability, which had long been generally granted to manufacturing corporations in other states, and at the same time established certain safeguards for creditors and laid down rules concerning many matters which had theretofore normally been left to the discretion of the shareholders. It provided that the capital of manufacturing corporations should be fixed and divided into shares at the first meeting, but might thereafter be increased up to a maximum to be fixed by the act of incorporation. Shareholders were to remain individually liable until the amount of the capital as fixed at the first meeting should be paid, and no shareholder's notes were to be accepted as payment. There was also to be shareholders' liability in case of division of any part of the capital. A board of directors, as well as a president, clerk, and treasurer, was prescribed, but the extent to which managerial powers were to be vested in directors was not stated. Officers who made loans to shareholders or failed to file a certificate of payment of capital were to be liable to creditors, as were also directors who permitted debts to exceed capital, signed willfully false certificates of condition, or declared dividends which rendered the corporation insolvent. No restrictions were placed on the voting rights of large shareholders.⁶⁶

In addition to these statutes relating to particular types of corporations, general laws had also been enacted conferring upon all corporations various powers, including power to determine by by-law matters not prescribed in their charters, and also providing for the appointment of receivers of dissolved corporations

and for execution and sale of the property and franchises of public-service corporations, and for execution on shares of corporate stock.⁶⁷

These various statutes indicate a wide divergence in legislative practice as to the extent to which the internal organization of a business corporation was prescribed by statute. The corporate business was confined by the charters in all cases either to some narrowly defined undertaking, as in the case of the turnpikes, canals, and railroads, or to the employment of a legislatively limited capital in some particular business carried on in a prescribed locality, but such matters as par value of shares, number and powers of directors, amount of debts which could be incurred, limitations on voting rights, and qualifications of directors were fixed in detail for certain types of corporations but left undetermined for others. While the legislature evinced much concern as to the capital structure and control of bank and insurance companies, it adopted in the main a go-as-you-please policy with respect to turnpikes, and, prior to 1830, a similar policy with respect to manufacturing corporations. Although the capitalization permitted was generally small, large aggregations of capital would at that time have been rare regardless of legislative restrictions, and several corporations formed during that period, such as the State Bank,⁶⁸ the Massachusetts Rail Road Corporation,⁶⁹ and some of the textile mills,⁷⁰ were permitted to raise a very substantial capital.

EARLY NEW YORK CORPORATION STATUTES

By contrast with Massachusetts legislation, that of New York was, during this period, much more uniform in providing, in the case of all business corporations, for a definite share structure and for initial payments of at least some portion of the amount of subscriptions, and also in stipulating for management of all

corporations by boards of directors. Thus the New York Turnpike Act of 1827,⁷¹ which was to be read into the turnpike charters thereafter granted, called for the appointment of commissioners who should enter subscriptions in their books only on receipt of one tenth of the par value of the shares of such corporations as fixed by their charters, and should call the first meeting only when one tenth of the capital as so fixed should be subscribed. The Act provided for a board of five directors, who were authorized to make by-laws, appoint officers, receive additional subscriptions, make calls, provide for the construction of the road, and pay dividends out of earnings, the directors not to be personally interested in any construction contracts. Voting rights were weighted slightly in favor of small shareholders.

No general statute was adopted with respect to bridge companies, canal companies, or railroads, but the special charters of these types of enterprise seem to have closely resembled the provisions of the Turnpike Act.⁷² The original act of incorporation of the New York Erie Railroad⁷³ provided for the ambitious undertaking of building a railroad from New York City to Lake Erie, with a capital of \$10,000,000, but this large sum was not forthcoming and an amendatory act in the following year permitted the company to organize as soon as \$1,000,000 should have been subscribed.⁷⁴

Although banks and insurance companies, like all New York corporations other than manufacturing companies, were incorporated by special act,⁷⁵ the Revised Statutes of 1829⁷⁶ provided that all such companies whose charters were granted or extended after January 1, 1828, should be governed by a general act which contained unusually detailed rules for the election of directors and review thereof by the court in case of dispute, and also a long series of regulations and prohibitions designed to protect creditors and shareholders. Directors were forbidden to pay dividends

except out of profits, to divide, withdraw, or reduce capital, to receive notes in payment of subscriptions, to purchase the corporation's own shares except out of profits, to exchange its shares or notes for shares or notes for other companies, to loan more than three times the amount of the capital, or to loan more than one third of it to the directors themselves. The method of calculating profits was prescribed in some detail, and it was provided that all past losses must be made good before dividends could be paid. All preferential transfers were invalidated, and directors violating any provisions of the Act were to be personally liable to creditors and stockholders by reason of such violations.⁷⁷ Annual financial reports were to be made to the comptroller and were to be open to public inspection. No bank or insurance company was to begin business until its capital or such portion as the charter might require had been paid in or secured. Creditors of banks created subsequent to April 2, 1829, were further protected by a law providing for a bank-guaranty fund.⁷⁸

As early as 1811 the New York legislature encouraged the formation of corporations for the manufacture of certain important commodities, such as textiles and metal products, by granting the privilege of self-incorporation to the promoters of such enterprises. As originally enacted, the act of 1811⁷⁹ permitted any five or more persons to incorporate by signing, acknowledging, and filing a certificate stating the name, place of business, objects, and capital of the corporation (which was not to exceed \$100,000), the number of shares, the number of the trustees or directors, and the names of the original board. The corporations so formed were to exist for twenty years and were to be managed by trustees elected by the shareholders, voting by shares either in person or by proxy. The trustees were empowered to adopt by-laws and prescribe the duties and determine the compensation of the officers and employees. Shares were to be transferable as the by-laws should pro-

vide, and shareholders were to be liable only "to the extent of their respective shares of stock."

Despite the adoption of this act, special charters of incorporation for manufacturing purposes continued to be granted to some extent, a few of them providing for capital in excess of \$100,000.⁸⁰ The later of these corporations, as well as those formed under the general act, were governed in part by a title of the Revised Statutes⁸¹ which was applicable to stock corporations generally, with the exception of banks and insurance companies. That title provided for shareholders' liability to creditors up to the amount of their shares, for legislative amendment and repeal of charters, for inspection of stock and stock-transfer books by shareholders, and for directors' liability to the corporation and to its creditors in case of reduction or withdrawal of capital by dividends or otherwise, of receipt of notes in payment for shares or of incurring debts in excess of three times the capital. It also forbade preferential transfers and made elaborate provision for corporate elections and judicial review thereof. A subsequent chapter of the Revised Statutes⁸² relating to procedure dealt extensively with actions at law by and against corporations, with equity powers over corporations and their officers, with creditors' bills for the enforcement of shareholders' liabilities, and with voluntary dissolution.

The New York legislature, like that of Massachusetts, had also at this time directed its attention to the problem of regulating the doing of business by foreign corporations engaged in the business of fire insurance,⁸³ but while the Massachusetts legislation was concerned chiefly with protecting local policyholders, that of New York dealt solely with excluding from the state fire-insurance corporations formed in foreign countries and with imposing a heavy tax upon corporations of other states.⁸⁴

A comparison of the New York with the Massachusetts statutes indicates considerable diversity between the policies adopted by

the two states. Although the legislation of each indicates considerable solicitude for creditors of banks and insurance companies, the particular safeguards adopted were markedly different, especially in the case of banks, where New York had before 1835 substituted a guaranty fund for shareholders' liability. Massachusetts was far more prone to discourage concentration of control in the hands of large shareholders and, unlike New York, experimented quite extensively with a type of corporation in which the capitalization was indeterminate. Despite the fact that Massachusetts equity courts had no general powers but only those specifically granted by statute, Massachusetts legislative provisions for jurisdiction of courts over corporations and corporate officers were much more fragmentary in character than was the case in New York.

SUBSEQUENT STATUTORY DEVELOPMENTS IN

AMERICAN CORPORATION LAW

Substantial as are the differences between these early statutes and the far more comprehensive corporation codes of the present time, it is none the less true that many of the smaller of our modern corporations might, without serious embarrassment to their activities, be organized under such statutes as those applicable to New York manufacturing corporations of 1835. Apart from the gradual spread of the privilege of self-incorporation, which was almost unknown in 1835 outside of New York,⁸⁵ the principal changes in our statutory corporation law have been designed primarily to make it more flexible and more suited to the real or supposed needs of big business and modern finance. By degrees the limitations on the size of enterprises have been removed⁸⁶ and they have been permitted to engage, without limit of time, in any sort of lawful business,⁸⁷ and, generally speaking, in as many varieties of business as their articles may specify.⁸⁸

Flexibility has also been increased by provisions now widely

prevalent authorizing the insertion in articles of incorporation of clauses defining and regulating the powers of directors, shareholders, or classes of shareholders,⁸⁹ including provisions giving directors broad power to fix the preferences and other terms of future stock issues.⁹⁰ Permission is also generally given for almost unlimited amendment of articles and for combination with other corporations by merger or sale of assets in exchange for stock.⁹¹ Thus, while most corporations of today remain in practice much like those of a hundred years ago—enterprises in which the investor embarks his funds in a particular undertaking with a clearly defined capital structure—every modern corporation is (or by reincorporation in some “liberal” state, such as Delaware, may become) potentially one in which the management, with some coöperation from the majority shareholders, may, in the absence of proof of bad faith, modify almost without limit the character of the business to be done and the rights of particular classes of shares in earnings and assets.⁹²

Under the encouragement given by these statutes, the corporation has become the major factor in the industrial and commercial life of the nation and has been of incalculable assistance in transforming us from an agricultural to an industrial people—a transformation generally assumed to have been beneficial. Without questioning that assumption, there is much reason to believe that the liberality of our modern corporation laws is far from being an unmixed blessing. Freedom to mold the corporate contract as promoters may desire and freedom of amendment have subjected investors' funds to new and serious dangers. The granting of the privilege of limited liability to enterprises with a merely nominal capital has led to an undesirable degree of financial irresponsibility. On the other hand, the removal of the limitations on maximum size has brought into existence gigantic enterprises whose social and economic advantages to the community are

questioned by some of the best informed critics of our economic system.⁹³ The holding-company device, unknown a hundred years ago but sanctioned by our modern statutes, although possessing some merits, has substantially increased the difficulties of protecting both investors and the public generally.⁹⁴ Tolerance of the one-man company has led to the use of the corporate device as an alias under which an individual may often successfully evade liabilities and responsibilities to which he ought fairly to be subjected.⁹⁵

The character of our present corporation laws, like that of many other laws relating to property and business, is due primarily to the fact that we have as a nation been far more concerned with increasing the production of wealth than with providing for its equitable distribution. In the case of the corporation, however, a peculiar factor has, since 1835, been introduced into the situation by the discovery by business men and their attorneys of the possibility of incorporating in one state to do business in another.⁹⁶ The result has been to induce certain states to seek increased revenue by offering to promoters the kind of corporation statute which they desire, sometimes with little consideration of the effect of what may be done under such a statute on investors or the community at large. Fear of driving away business has not only generally prevented other states from denying to such enterprises the privilege of doing business within their borders but has caused them to relax their own corporation laws in an effort to check the trend of their citizens toward seeking incorporation elsewhere.⁹⁷

For these and other reasons, the general tendency of our present-day corporation statutes is to give permission to promoters to shape articles of incorporation in almost any way that they may desire, and, by means of the language of such articles or that of the statutes themselves, to grant extremely broad powers to the man-

agement or to the management when supported by vote of the majority of the shareholders. Yet it is by no means true that the change has been entirely in the direction of freedom from restraint. Modern corporation statutes are much more detailed than those of a century ago, and, while conferring much wider powers and privileges, also contain a number of mandatory provisions and limitations unknown to an earlier age. Although the introduction of many of these mandatory provisions has been due largely to a recognition of the desirability of certainty on matters in which absence of rule is more likely to lead to legal doubt than to desired flexibility and freedom, some of the more recent restrictions are definitely designed for the protection of investors or creditors. Thus, for example, many of the newer incorporation acts contain elaborate provisions with regard to corporate accounting and to the definition and use of capital, surplus, and profits, some of these provisions being substantially protective in character.⁹⁸ In the main, however, here as elsewhere the trend has been in the direction of flexibility or laxity, as one may prefer to phrase it. Thus many modern statutes permit all but a nominal amount of the proceeds of subscriptions to be treated as paid-in surplus,⁹⁹ and apparently allow such surplus to be distributed as freely as though it had been earned,¹⁰⁰ and also permit capital, with the consent of a majority of the shareholders, to be drastically reduced and the surplus thus created to be divided.¹⁰¹ Important corporation states permit dividends from current or recent earnings without regard to previous losses.¹⁰²

The statutes above described are not, indeed, in their entirety applicable to all classes of corporations—certain enterprises, such as banks, insurance companies, and public utilities, being governed wholly or partly by separate statutes of a more restrictive character,¹⁰³ but the more liberal statutes may in general be availed of by any manufacturing or mercantile enterprise and also

by investment and holding companies regardless of the nature of the business done by their subsidiaries.

It would, however, be misleading to treat our modern corporation acts as though the comparatively few restrictive provisions which most of them contain were the only safeguards which the legislatures have provided against misconduct by those in control of corporations. Such protection as modern legislation has given to labor and to the consumer is imposed by laws which, although motivated to some extent by fears of the economic power of large corporations, are in general applicable to business enterprises regardless of their form of organization, and hence can scarcely be regarded as forming part of the law of corporations. On the other hand, the peculiar dangers which confront the corporate investor—dangers due to the average investor's inability to ascertain the financial condition of the enterprise before embarking his money in it and to his inability to exercise any effective control over its operations thereafter—are, in the main, peculiar to corporate and quasi-corporate organizations and have led to legislation directed specifically at those forms of enterprise.

During the early years of the nineteenth century, the legislatures, in imposing restrictions upon corporations, were, for the most part,¹⁰⁴ endeavoring to protect the general public and corporate creditors rather than corporate investors, although an incidental effect of the restrictions imposed was to limit the uses to which the management could lawfully put the shareholders' money. Corporations, though regarded as necessary for the rapid growth of business, were looked upon as somewhat dangerous to the community at large, and the risks which their limited liability imposed upon creditors were early appreciated. On the other hand, it was assumed until recently that the transaction by which the investor put his money into a corporation was properly governed by the rule of *caveat emptor*, and that once he had become

a member of the association his voting power and such means as courts of equity might adopt for enforcing the fiduciary duties of the management were adequate to protect him.

There has, as we have seen, been little change in this situation so far as the corporation statutes are concerned, except in so far as the increased powers which these statutes give to promoters and managers further augment the shareholders' risks. However, at the same time that promoters and their attorneys have been inducing legislatures to frame the provisions of corporation statutes to suit their desires, champions of the small investor have been carrying on a flank attack which has resulted in the enactment of important legislation which is distinct from the corporation statutes but furnishes a substantial protection to the corporate investor, chiefly at the time when the enterprise is launched or additional securities are marketed. Beginning with the Kansas Act of 1911,¹⁰⁵ so-called "blue sky" laws imposing important restrictions upon the sale of securities and setting up administrative machinery for their enforcement have been enacted in nearly all of the states, and these have recently been supplemented by federal regulation of interstate security offerings and security exchanges.¹⁰⁶ Although these regulations deal primarily with the conditions under which securities may be sold, federal regulation of security exchanges has been made sufficiently broad to include some control over the corporate management.¹⁰⁷ Furthermore, the recent reorganization amendments to the Federal Bankruptcy Act,¹⁰⁸ though motivated largely by the desire to prevent minorities from obstructing reorganization and by the desire to make it more difficult for creditors to squeeze out the shareholders' interest in corporations whose financial embarrassments might prove to be only temporary, were nevertheless influenced also by the intention to afford the individual investor and the individual creditor protection against bankers and others who

normally control corporations which are in process of reorganization.¹⁰⁹

NONSTATUTORY CORPORATION LAW IN 1835 AND TODAY

Statutory developments have thus been substantial, but despite that fact the corporation lawyer of today would feel himself more at home with the statutory than with the case law of a century ago. While the legislatures had already been compelled by the needs of business to frame their enabling acts to fit the requirements of capitalistic enterprise, the case law of the time was more slowly and hesitatingly building up a body of precedents which differentiated business corporation law from that of the public and nonprofit corporations with which the older English cases had been almost exclusively concerned. Although when contrasted with contemporary English treatises the first American textbook on private corporations¹¹⁰ strikes a distinctly modern note, the general impression that it leaves on a modern reader is decidedly archaic. A large part of it is devoted to a discussion of English precedents, which have only a remote bearing on business-corporation problems, and, although it cites some four hundred and fifty American cases most of which relate to business corporations, the part of the field of business-corporation law as we know it today which these cases cover is relatively small.

Substantial progress had, indeed, been made on a number of points. The old rule that corporations could legally bind themselves only by the use of the corporate seal had been definitely discarded,¹¹¹ and a considerable body of law as to the powers and mode of action of the shareholders, directors, and officers, and as to the liability of the corporation for their contracts and torts had been created.¹¹² The nonliability of shareholders for corporate debts in the absence of statute had been declared by at least two courts.¹¹³ The problem of *ultra vires* had already presented itself

and had in general been dealt with in somewhat summary fashion,¹¹⁴ with little of the attempt made later in the nineteenth century to relate it to elaborate theories as to the nature of corporate personality.¹¹⁵ A number of procedural rules respecting actions by and against corporations had been established, and it had been indicated that shareholders might, under some circumstances, be estopped to deny the due incorporation of their enterprise.¹¹⁶ The right of a foreign corporation to sue had been declared,¹¹⁷ but more difficulty was found in making it amenable to suit.¹¹⁸ Litigation concerning corporate elections had settled a few points including the disfranchisement of shares held in trust for the corporation¹¹⁹ and the propriety of *quo warranto* as a method of determining title to office in private corporations.¹²⁰

Failure to pay subscriptions had produced a good deal of litigation. Although express promises to pay had been held enforceable despite contentions that consideration was lacking, it had been decided in Massachusetts that a mere agreement to take shares without an express promise to pay for them gave the corporation merely the right to forfeit the shares if payment was not forthcoming.¹²¹ It had further been held in the same state that the obtaining of subscriptions to the entire amount of the capital was a condition precedent to liability to pay,¹²² and in New Hampshire that, in the absence of an agreement to the contrary, transfer of the shares put an end to liability for future calls.¹²³ The doctrine of the pre-emptive right of existing shareholders in new issues of stock had already been enunciated by the Massachusetts court¹²⁴ in categorical terms which have proved somewhat inconvenient for corporate executives in these days when the management of large enterprises tends rather to hire capital than to be hired by it.¹²⁵ Litigation with respect to the transfer of shares had produced a number of decisions, including rules that a transfer may be valid between the parties even though not recorded on

the books as prescribed by the charter,¹²⁶ that a corporation is liable in assumpsit to a purchaser of shares for refusing to enter a transfer on the books,¹²⁷ and that a corporation has no implied lien on shares for debts due to it.¹²⁸

Little progress had been made in defining the fiduciary duties of directors and the rights of shareholders to enforce them, although it had been held in New York that directors could not deny to a member of the board the right to look at the books,¹²⁹ and a prophetic dictum by Chancellor Walworth had asserted the liability of the directors to the corporation for losses due to their negligence or *ultra vires* acts and the right of the shareholder to enforce such liability in equity by a suit to which the corporation was a party.¹³⁰ The famous case of *Wood v. Dummer*¹³¹ had settled the law with regard to the liability of shareholders who received corporate property in liquidation before debts had been paid, but, in so doing, had introduced into our jurisprudence a conception of corporate creditors as *cestuis que trust* that was to plague courts and lawyers for a century.

The effect of the corporate charter as a contract immune from legislative attack in the absence of a reserved power of amendment or repeal had already been established,¹³² and the right of a corporation to sue in the federal courts had been declared but was as yet limited to cases in which all of the shareholders were citizens of a state other than that of the defendant.¹³³

From these somewhat meager beginnings, the body of doctrine applicable to corporations for profit has grown to vast dimensions during the last century. The tendency of profit-seeking business men to disregard the narrow limitations of the older corporate charters led during the later nineteenth century to a multitude of decisions on implied powers of corporations and on the legal effect of *ultra vires*, questions which the liberality of modern corporation laws and the recognition by courts of today that most

kinds of *ultra vires* acts are not of public concern have of recent years deprived of some of their importance.¹³⁴ The activities of corporate promoters have given rise to decisions in which judicial efforts to grapple with the dialectical difficulties involved in attempting to concede agency powers to and impose fiduciary duties upon those who act for a merely proposed principal have been only moderately successful.¹³⁵ Attempts to enforce subscriptions and other shareholders' liabilities have developed many legal rules, including those relating to extrastate enforcement of liabilities and those concerning watered stock, which latter have recently been circumvented through the use of stock without par value. The dicta of Chancellor Walworth with respect to director's duties and their enforcement by minority shareholders have served as a basis for a body of decisions important enough to form a fit subject for a treatise. One-man companies and parent and subsidiary corporations have led to judicial refusals to recognize the corporate fiction as a legal nonconductor in all cases. The modern combination of trust, mortgage, and negotiable instrument known as the corporate bond has brought into being a mass of case law which vitally concerns corporations, though its conceptual roots are imbedded in other soil. The growth of the practice of trading in shares and the increased use of share certificates as collateral have made transfer of shares a major legal topic.¹³⁶ Statutory authorization to majorities to make radical changes in the enterprise through amendment of charters, merger, consolidation, and sale has necessitated judicial consideration of the constitutional, statutory, and equitable rights of minority shareholders and creditors. The practical necessities of reorganization of financially embarrassed corporations have led courts of equity to put the ancient creditor's and mortgagee's bills to new and strange uses, and the law which the judges have thus developed has furnished a foundation for new departures in legislation.¹³⁷

The constitutional problems relating to both foreign and domestic corporations have received a great deal of attention. The protection apparently given to corporations by the contract clause as interpreted in the *Dartmouth College* case has been greatly diminished by the doctrine of strict construction of special franchises,¹³⁸ by the growth of the police-power concept,¹³⁹ and by a modern tendency to grant only amendable charters,¹⁴⁰ but the modern corporation has found a substitute shelter from legislative attacks in the Fourteenth Amendment.¹⁴¹ The theory that a foreign corporation could be arbitrarily excluded and hence could be admitted subject to any conditions which the state might impose seemed for a time to exclude the foreign corporation from this shelter, but the development of the doctrine of unconstitutional conditions and the extension of the concept of unconstitutional burdens on interstate commerce have greatly improved its position.¹⁴²

Where no such problems of legislative power are involved, our latter-day corporation law has been marked by an increasing tendency to view the law applicable to incorporated business as a branch of private rather than of public law, of the law of property and of association rather than of franchise.¹⁴³ Realistic and beneficial for the most part, this development has not allowed sufficiently for the fact that a corporation which, instead of confining its membership to its promoters, solicits funds from the investing public becomes, by reason of such solicitation, something other than a merely private institution. Our English brethren have long since styled such an organization a public company,¹⁴⁴ our legislatures are slowly learning to treat it as such for some purpose at least, and our courts cannot fail to do likewise if they are to play their proper part in adapting our corporation law to fit the needs of the times. Nineteenth-century judges as well as legislators tended to shape all branches of our commercial

law, including that of business corporations, to fit the real or supposed requirements of business expansion,¹⁴⁵ but we are coming to recognize that the need of our times is rather to shape them so as to give increased security to the worker, the consumer, and the investor. Safeguards for the first two classes lie, as has already been indicated, rather in the field of general business law than in the law of corporations. Increased safety for the investor must, if corporations financed by public subscription are to survive and flourish, be a major goal of our corporation law of the future.¹⁴⁶ The further implementing of the fiduciary principle as applied to those who, either as officers, trustees, reorganization committees, or dominant shareholders, guide the destinies of our great business institutions is a need to which only those who would welcome the downfall of corporate capitalism can reasonably be indifferent.¹⁴⁷

NOTES

¹⁴⁵Shipping developed very rapidly after the Revolution. The Embargo Act of 1807, 2 Stat. 451, and the War of 1812 caused it to languish for a time, but greatly stimulated the growth of manufacturing.

¹⁴⁶See MEYER AND MACGILL, *HISTORY OF TRANSPORTATION IN THE UNITED STATES BEFORE 1860* (1917).

¹⁴⁷See CLARK, *HISTORY OF MANUFACTURES IN THE UNITED STATES, 1607-1860* (1916) cc. 16, 17. According to the somewhat unreliable census of 1840, capital employed in manufactures on that date amounted to \$267,000,000, the largest single industries being flour, grist, and saw mills, which were lumped together in the census and had a combined capital of \$76,000,000; cotton, with a capital of \$51,000,000; shoes and leather, with \$28,000,000; and woolens, with \$15,000,000. Iron mining and manufacturing, which was not included in the above manufacturing total, employed capital of \$20,000,000; retail trade employed \$250,000,000, and foreign trade \$119,000,000. Of these, the cotton, woolen, and iron industries often assumed the corporate form.

¹⁴⁸Six Massachusetts textile companies, incorporated on or before 1835, each had an authorized capital of \$1,000,000 or more. See WARR, *THE EARLY NEW ENGLAND COTTON MANUFACTURE* (1931) cc. 5, 6.

¹⁴⁹Over one hundred commercial banks, savings banks, and other institutions with banking powers had been incorporated in New York alone by 1835, though some of the older ones had ceased to exist by that date. See *NEW YORK GENERAL INDEX OF LAWS 1777-1857* (1859) 97 *et seq.*

⁶ About one hundred insurance corporations, including both stock and mutual companies, had been incorporated in New York alone by 1835. *Id.* at 345 *et seq.*

⁷ The Cumberland road, built by the federal government, and the Erie canal, built by the State of New York, were the most important of these.

⁸ The federal government supplied \$7,000,000 of the \$35,000,000 capital of the Second Bank of the United States. WHITE, MONEY AND BANKING (5th ed. 1914) 275. The states supplied part of the capital of some of the larger banks and of a few of the earlier manufacturing enterprises. For an instance of the latter see 2 DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS (1917) 275.

⁹ STORY, PARTNERSHIP (1st ed. 1841).

¹⁰ It is to be noted, however, that even after the reforms of 1832, Parliament continued for some time reluctant to grant corporate privileges, particularly that of limited liability. See Hunt, *The Joint-Stock Company in England 1830-1844* (1935) 43 J. POL. ECON. 331.

¹¹ Massachusetts granted charters to eleven manufacturing companies in 1809, and had incorporated some three hundred and fifty by 1835, about two thirds of which were textile manufacturing companies. New York granted eight charters to manufacturing corporations in 1809. By 1835 it had granted some seventy more by special act and had also by a statute enacted in 1811 given permission for the formation of certain of the commoner types of manufacturing enterprises under a general act. The records in the secretary of state's office indicate that by 1835 advantage had been taken of this permission by the organizers of some two hundred and twenty-five corporations, including nearly one hundred and fifty textile companies and about fifty companies engaged in the manufacture of metal products.

¹² For railroad construction during the decade 1830-1840, see MEYER AND MACGILL, *op. cit. supra* note 2, plate 3.

¹³ For an interesting survey of developments in the American law of private corporations in the eighteenth and nineteenth centuries, see Baldwin, *Private Corporations*, in TWO CENTURIES GROWTH OF AMERICAN LAW (1902). For eighteenth-century corporations, see DAVIS, *loc. cit. supra* note 8.

¹⁴ WATSON, PARTNERSHIP (1794); MONTAGU, PARTNERSHIP (1815); GOW, PARTNERSHIP (1823); CAREY, PARTNERSHIP (1827); COLLYER, PARTNERSHIP (1832). American editions of Watson were published in 1795 and 1807, of Montagu in 1824, of Gow in 1825 and 1830, and of Collyer in 1834.

¹⁵ Story's first edition, *supra* note 9, contains over four hundred separate citations of American cases. The actual number of American partnership cases cited is, however, much less, as the leading cases are cited many times and some of the cases cited do not deal with partnership law but with collateral matters.

¹⁶ See STORY, *op. cit. supra* note 9, c. 4.

¹⁷ 8 H. L. 268 (1860).

¹⁸ See UNIFORM PARTNERSHIP ACT, 7 U.L.A. (1922) § 7 (1).

¹⁹ See STORY, *op. cit. supra* note 9, at 144 *et seq.*, 188, 189.

²⁰ See STORY, *op. cit. supra* note 9, at 169, 192, 145.

²¹ See STORY, *op. cit. supra* note 9, at 179.

²² See UNIFORM PARTNERSHIP ACT, 7 U.L.A. (1922) § 9 (1).

²³ See STORY, *op. cit. supra* note 9, at 373 *et seq.*

²⁴ See UNIFORM PARTNERSHIP ACT, 7 U.L.A. (1922) §§ 25 (2) (c), 28.

²⁵ See STORY, *op. cit. supra* note 9, c. 9.

²⁶ See STORY, *op. cit. supra* note 9, c. 11.

²⁷ See STORY, *op. cit. supra* note 9, cc. 8, 12.

²⁸ See STORY, *op. cit. supra* note 9, at 236 *et seq.*

²⁹ See STORY, *op. cit. supra* note 9, at 139, 457 *et seq.*

³⁰ See STORY, *op. cit. supra* note 9, c. 15.

³¹ Act of July 1, 1898, c. 541, 30 Stat. 544 (1898), 11 U.S.C.A. 3 (1926).

³² See *Francis v. McNeal*, 228 U. S. 695, 33 Sup. Ct. 701 (1913); *Liberty National Bank v. Bear*, 276 U. S. 215, 48 Sup. Ct. 252 (1928).

³³ 6 Ves. Jr. 119 (1801).

³⁴ See STORY, *op. cit. supra* note 9, at 135, 508.

³⁵ There has been considerable tendency in modern decisions to treat the firm as an entity for certain purposes, a tendency not existing in 1835, but the practical consequences of this entity talk have not been very important. The Uniform Act rejects the entity idea in theory but accomplishes many of the practical results which would logically follow from its adoption.

³⁶ The principal changes introduced by the Uniform Act are a new concept of tenancy in partnership, resulting in a modification of the rules with respect both to voluntary and to involuntary transfers of an individual partner's interest, and of those relating to conveyances and descent of partnership realty and the adoption of new principles applicable to dissolution by death and to the liability of incoming partners.

³⁷ See STORY, *op. cit. supra* note 9, at 254. For American use of the unincorporated joint-stock association prior to 1800, see 2 DAVIS, *op. cit. supra* note 8, at 258 *et seq.*

³⁸ N. Y. Laws 1849, c. 258.

³⁹ Although a few real-estate corporations were chartered by special act, they could not be created in Massachusetts under the general laws until 1912. See Mass. Acts 1912, c. 595.

⁴⁰ Incorporation of real-estate enterprises was for a long time equally impossible in most other states, but it was only in Massachusetts that the business trust was early developed as a substitute.

⁴¹ See *Hecht v. Malley*, 265 U. S. 144, 44 Sup. Ct. 462 (1924) (federal corporation excise tax applied to business trust); *Hemphill v. Orloff*, 277 U. S. 537, 48 Sup. Ct. 577 (1928) (state statute imposing same conditions on foreign business trusts as on foreign corporations seeking to do a local business held constitutional); N. Y. Tax Law (1909) § 208, Cons. Laws (Cahill, 1930) c. 61 (defining "corporations" for franchise-tax purposes as including joint-stock associations and business trusts). But cf. Opinion of the Justices, 266 Mass. 590, 165 N. E. 904 (1929).

⁴² The short-lived enthusiasm of American corporation lawyers in various parts of the country for the business trust as a substitute for the corporation was both mirrored and stimulated by three textbooks published between 1912 and 1923. SEARS, *TRUST ESTATES AS BUSINESS COMPANIES* (1st ed. 1912, 2d ed. 1921); WRIGHTINGTON, *UNINCORPORATED ASSOCIATIONS* (1st ed. 1916, 2d ed. 1923); DUNN, *TRUSTS FOR BUSINESS PURPOSES* (1922).

⁴³ See LA. CIV. CODE (1825) arts. 2810-2822.

⁴⁴ See N. Y. Laws 1822, 259; Mass. Laws, Jan. Sess. 1834-Jan. Sess. 1836, c. 48, 353.

⁴⁵ See UNIFORM LIMITED PARTNERSHIP ACT, 8 U.L.A. (1922) §§ 6, 7, 11.

⁴⁶ With the exception of District of Columbia and territorial corporations, which are local rather than national in character, there have been very few federal corporations other than national banks.

⁴⁷ Even as late as 1832, Angell and Ames found very few English corporation cases other than those dealing with municipal corporations [see ANGELL AND AMES (1st ed. 1832), *supra*, preface, vi], and although there were at that time some English business-corporation cases which these authors do not cite, it is substantially true that the English case law of business corporations did not develop until a later period. GRANT, *CORPORATIONS* (1850), is the first English textbook that contains more than casual references to corporations formed for business purposes.

⁴⁸ For an example of such a charter see N. Y. Laws 1799, c. 84, incorporating the Manhattan Company with an authorized capital of \$2,000,000, with power to supply water to residents of New York City and to employ its surplus capital "in the purchase of public or other stock, or in any other monied transactions or operations." Popular disapproval of legislative liberality in this respect had already by 1835 manifested itself in a few states in the form of constitutional provisions requiring a two-thirds vote for the creation of a corporation. See N. Y. CONST. OF 1822, art. 7, § IX, 1 N. Y. REV. STAT. (1829) 53; DEL. CONST. OF 1831, art. 2, § 17.

⁴⁹ The corporate charters granted by the Maryland legislature during this period are described in BLANDI, *MARYLAND BUSINESS CORPORATIONS 1783-1852* (1934). There appear to have been no general acts in force in that state in 1835 which were applicable to business corporations.

For early Pennsylvania corporations see BEITEL, *DIGEST OF TITLES OF CORPORATIONS CHARTERED IN PENNSYLVANIA BETWEEN 1700 AND 1873* (2d ed. 1874).

⁵⁰ Many of the western and southern states adopted during this period the policy of chartering relatively few banks and permitting some or all of these to establish branches. Generally speaking, the southern and western bank acts contained fewer safeguards for creditors than did those of New York and Massachusetts. For the bank charters and bank laws of the various states see DEWEY, *STATE BANKING BEFORE THE CIVIL WAR* (Sen. Doc. No. 581, 61st Cong. 2d Sess.).

Manufacturing corporations also were less numerous in the West and South, but this was probably due rather to economic conditions than to legislative policy. As the census of 1840 indicates, New York and Massachusetts were then the leading manufacturing states in the country. In Pennsylvania, which was third in importance in manufacturing, incorporation of manufacturing enterprises was much less common than in Massachusetts or New York.

⁵¹ For a detailed account of early Massachusetts corporation statutes see Dodd, *The First Half Century of Statutory Regulation of Business Corporations in Massachusetts*, *HARVARD LEGAL ESSAYS* (1934) 65.

⁵² Mass. Laws and Resolves 1782-83 (reprint 1890) 595. As originally enacted, this statute provided for a method by which tenants in common might form an association, but did not clearly incorporate the association so formed. A slight change in phraseology in the Revised Statutes of 1836 made the act clearly one of incorporation. See MASS. REV. STAT. (1836) c. 43.

⁵³ *Id.*, c. 40, which is substantially the original act of 1799.

⁵⁴ *Id.*, c. 39, §§ 1-44.

⁵⁵ It was held in *Andover and Medford Turnpike Corp. v. Gould*, 6 Mass. 40 (1809), that, in the absence of an express promise to pay, the statutory right of forfeiture was the corporation's only remedy for nonpayment of assessments.

⁵⁶ For examples of turnpike charters see Act of March 4, 1826, incorporating the Newburyport Bridge, Mass. Laws May Sess. 1825-Jan. Sess. 1828, c. 164, p. 285, and Act of March 12, 1828, incorporating the Warren Bridge, Mass. Laws May Sess. 1825-Jan. Sess. 1828, c. 127, § 51.

⁵⁷ MASS. REV. STAT. (1836) c. 39, §§ 87-92.

⁵⁸ For examples of canal-company charters see Act of June 17, 1817, incorporating the Penobscot Canal Corporation, Mass. Laws May Sess. 1815-Jan. Sess. 1818, c. 52, 448, and Act of Jan. 14, 1823, incorporating the Blackstone Canal Company, Mass. Laws May Sess. 1822-Jan. Sess. 1825, c. 27, 38. The latter corporation, like several other early interstate bridges and canals, obtained charters from two states.

⁵⁹ MASS. REV. STAT. (1836) c. 39, §§ 45-86 (containing provisions enacted in 1831, 1834, and 1835).

⁶⁰ *Id.*, c. 36. Issue of bank bills other than those of incorporated banks was prohibited *id.*, c. 33, § 7 (enacted in 1804).

⁶¹ Bank charters were generally granted for a period of twenty years or less, though this period was often extended by renewals.

⁶² See MASS. REV. STAT. (1836) c. 37, §§ 1-23.

⁶³ *Id.*, c. 37, §§ 24-39.

⁶⁴ *Id.*, c. 37, §§ 40-48.

⁶⁵ *Id.*, c. 38.

⁶⁶ Whether by reason of legislative policy or lack of demand, corporate charters were rarely granted in Massachusetts during this period except for enterprises falling within one of the various classes enumerated in the text. There were, however, a few special charters for other kinds of business undertakings, such as real-estate companies, hotels, theaters, steamboat companies, and stagecoach companies.

⁶⁷ MASS. REV. STAT. (1836) cc. 44, 97, §§ 36-41.

⁶⁸ Incorporated by act of June 26, 1811, Mass. Laws May Sess. 1809-Jan. Sess. 1811, c. 84, 501, with an authorized capital of \$3,000,000.

⁶⁹ Incorporated by act of March 12, 1830, Mass. Laws May Sess. 1828-Jan. Sess. 1831, c. 94, 424, with an authorized capital of \$3,500,000.

⁷⁰ See WARE, *op. cit. supra* note 4, Appendix A.

⁷¹ See 1 N. Y. REV. STAT. (1829) pt. 1, c. 18, tit. 1, 577.

⁷² For a bridge-company charter see "An Act to incorporate the Seneca bridge company," N. Y. Laws 1834, c. 283. For a canal-company charter see "An Act to incorporate the Black River Company," N. Y. Laws 1832, c. 174.

⁷³ *Id.*, c. 224.

⁷⁴ N. Y. Laws 1833, c. 182. See MEYER AND MACGILL, *op. cit. supra* note 2, at 368.

⁷⁵ For a special act incorporating a bank see "An Act to incorporate the Albany city bank," N. Y. Laws 1834, c. 218; for one incorporating an insurance company see "An Act to incorporate the Greenwich insurance company," N. Y. Laws 1834, c. 285.

⁷⁶ 1 N. Y. REV. STAT. (1829) pt. 1, c. 18, tit. 2, 588. For an account of the New York banking system see CHADDOCK, THE SAFETY FUND BANKING SYSTEM IN NEW YORK 1829-1866 (Sen. Doc. No. 581, 61st Cong. 2d Sess.).

⁷⁷ Additional provisions, to the effect that every director should be deemed to have sufficient knowledge of the affairs of his corporation to enable him to determine whether any act or omission constituted a violation of the statute, that directors should be liable to shareholders and creditors in case of corporate insolvency unless they could prove that they had used the care legally required of paid agents, and that shareholders, in case of such negligently caused insolvency, should be liable to creditors for any deficiency not collected from the directors, were repealed by N. Y. Laws 1830, c. 71, after the passage of the bank-guaranty law.

⁷⁸ Act of April 2, 1829, *as am'd*, Act of April 29, 1833, Act of May 11, 1835,

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1 N. Y. REV. STAT. (2d ed. 1836) pt. 1, c. 18, tit. 4, 606. This act also provided for periodic inspection of banks by commissioners, limited bank notes to twice the capital and bank loans to two and one-half times the capital, and forbade interlocking directors.

Incorporated banks were given a monopoly of the banking business by an act which prohibited all other individuals, associations, and corporations from engaging therein. 1 N. Y. REV. STAT. (2d ed. 1836) pt. 1, c. 20, tit. 20, enacted in 1804. This situation was radically altered in 1838 by the enactment of a law which permitted any person or legally authorized banking association that should transfer to the comptroller federal or state bonds or real-estate mortgages to issue an equivalent amount of bank notes, and also authorized any group of persons with a capital of not less than \$100,000 to form a banking association by making and recording a certificate. N. Y. Laws 1838, c. 260.

⁷⁹ N. Y. Laws 1811, c. 67. As originally enacted this act applied only to corporations organized for the manufacture of textiles, glass, or metal products. It was amended by N. Y. Laws 1815, c. 47, to include clay-products companies, by N. Y. Laws 1816, c. 58, to include companies for manufacturing pins or beer or extracting lead from ore, and by N. Y. Laws 1817, c. 223, and N. Y. Laws 1819, c. 102, to include leather companies located in certain counties. By N. Y. Laws 1821, c. 231, § 19, it was also made applicable to corporations for the manufacture of salt, with the limitation that the capital of such corporations should not exceed \$50,000. Although the original act was to remain in effect for five years only, it was extended from time to time by subsequent legislation, the last extension, made by N. Y. Laws 1821, c. 14, being for an unlimited period.

⁸⁰ For such a charter see "An Act to incorporate the Little Falls Manufacturing Company," N. Y. Laws 1832, c. 180 (corporation authorized to manufacture cotton and woolen goods and/or machinery in Little Falls, with a capital of \$300,000).

⁸¹ 1 N. Y. REV. STAT. (1829) pt. 1, c. 18, tit. 4, 601.

⁸² 2 *Id.*, pt. 3, c. 8, tit. 4, 457.

⁸³ See 1 *Id.*, pt. 1, c. 20, tit. 21, 714.

⁸⁴ For contemporary statutes in other states prohibiting, regulating, or taxing the doing of insurance business by corporations created elsewhere, see PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* (1927) 524.

⁸⁵ The trend toward general acts permitting incorporation by signing and filing articles began immediately after 1835. In 1836 Pennsylvania adopted a general act relating to corporations formed to manufacture iron by means of coke. Act of June 16, 1836, *PURD. PA. DIG.* (6th ed. 1700-1840) 185. In the same year North Carolina authorized silk and sugar-manufacturing corporations to be formed under a general law. 2 N. C. REV. STAT. (1837) 214 (enacted in 1836). In the following year Michigan adopted a general law applicable to several kinds of manufacturing corporations, and Connecticut anticipated modern developments by permitting formation under general laws of corporations for any kind of manufacturing or mining or quarrying or any other lawful business. Mich. Laws 1837, No. 121, 284; CONN. COMP. STAT. (1838) tit. 14, c. 2, 107 (enacted in 1837). Beginning about the middle of the nineteenth century, the enactment of general corporation laws was made necessary in many states by the adoption of constitutional provisions prohibiting the grant of general charters.

⁸⁶ For an account of the process by which restrictions on the size of enterprises have been gradually relaxed, see Brandeis, J., dissenting, in *Liggett Co. v. Lee*, 288 U. S. 517, 550, 53 Sup. Ct. 481, 490 (1933).

⁸⁷ Although nearly all corporation charters granted prior to 1835 narrowly limited

the character of the business which could be carried on, there were occasional charters that granted rather broad powers. One fairly common practice was to encourage the investment in some desired enterprise by giving the corporation the right, on condition of investing a certain amount of capital in that enterprise, to employ additional capital in the banking business. For examples of legislation of this sort see N. Y. Laws 1799, c. 84, incorporating the Manhattan Company, N. Y. Laws 1824, c. 148, amending the charter of the New York Chemical Manufacturing Company, and N. Y. Laws 1824, c. 270, amending the charter of the Delaware and Hudson Canal Company.

⁸⁸ Modern general corporation acts have for the most part developed out of the old manufacturing-corporation acts, which have been broadened to cover all types of businesses, sometimes with the exception of certain enterprises, such as public utilities and banks, deemed to require a greater amount of regulation.

⁸⁹ See DEL. REV. CODE (1915) c. 65, § 5 (8) *as am'd*; 15 PURD. ANN. STAT. PA. § 2852-204 (12).

⁹⁰ See DEL. REV. CODE (1915) c. 65, § 13 *as am'd*. Compare the more restricted provisions of N. Y. STOCK CORP. LAW § 11, *as am'd* Laws 1929, c. 600, § 2.

⁹¹ For amendments see DEL. REV. CODE (1915) c. 65, § 26 *as am'd*; N. Y. STOCK CORP. LAW §§ 35-38 *as am'd*. For sale of assets see DEL. REV. CODE (1915) c. 65, § 64a *as am'd*; N. Y. STOCK CORP. LAW §§ 20, 21, 22 *as am'd*. For merger and consolidation see DEL. REV. CODE (1915) c. 65, §§ 59, 60, 61, 62, 64; N. Y. STOCK CORP. LAW §§ 85-90 *as am'd*. In some states shareholders who express their dissent to radical amendments, sales, or mergers are entitled to recover the appraisal value of their shares in cash, but in several important jurisdictions, including Delaware, this appraisal right is given only in the case of merger or consolidation.

⁹² For a vivid if slightly overdrawn picture of the present situation see Berle, *Investors and the Revised Delaware Corporation Act* (1929) 29 COL. L. REV. 563; BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) bk. 2.

⁹³ See, e.g., BRANDEIS, *OTHER PEOPLE'S MONEY* (1914); BRANDEIS, *THE CURSE OF BUSINESS* (1934); DEWING, *THE FINANCIAL POLICY OF CORPORATIONS* (3d rev. ed. 1934) bk. v, c. 3.

⁹⁴ See BONBRIGHT AND MEANS, *THE HOLDING COMPANY* (1932); RIPLEY, *MAIN STREET AND WALL STREET* (1929).

⁹⁵ Immunity thus obtained has been partly legal—the result of theories about the legal separation between the corporation and its shareholders—and partly factual, due to the successful concealment of the sole owner's identity behind the corporate mask.

⁹⁶ Even prior to 1835 legislatures of one state occasionally granted charters to persons desiring to do business elsewhere. This appears to have been done, however, only where the enterprise was to be organized and financed by citizens of the state granting the charter. See BLANDI, *op. cit. supra* note 49, at 89, for Maryland charters of this type. The practice of choosing a state of incorporation solely for the laxity or liberality of its corporation laws and without reference either to the locality in which the business is to be done or to that in which the prospective owners of the enterprise reside is a much later development.

⁹⁷ See Brandeis, J., in *Liggett Co. v. Lee*, 288 U. S. 517, 557, 53 Sup. Ct. 481, 492 (1933).

⁹⁸ See, e.g., CAL. CIV. CODE (1931) §§ 300a, 300b, 346, 346a, 346b, 346c, 347, 348, 348a, 348b, 348c, *as am'd* by Stat. 1933.

⁹⁹ See DEL. REV. CODE (1915) c. 65, §§ 54 and 14 *as am'd*; N. J. COMP. STAT. (1911)

§ 121 *as am'd* by Laws 1930, c. 120. But *cf.* Mich. Gen. Corp. Act, MICH. COMP. LAWS (Supp. 1933) § 10135-20.

¹⁰⁰ There is nothing in the language of most modern corporation statutes to indicate that there are any restrictions on the use of paid-in surplus for any purpose for which earned surplus might be used. But *cf.* CAL. CIV. CODE (1931) §§ 346, 346c, *as am'd* Stat. 1933; ILL. REV. STAT. (Cahill, 1933) c. 32, § 41.

¹⁰¹ See DEL. REV. CODE (1915) c. 65, §§ 26, 28 *as am'd*; N. Y. STOCK CORP. LAW §§ 36, 38, 58. In many jurisdictions stock may be purchased out of capital by the directors without formal proceedings for reduction and without any shareholder authorization, but it is the courts rather than the legislatures which have been responsible for bringing about this result. The statutes of many of the leading corporation states, including Delaware and New York, forbid such purchase of stock except out of surplus. See DEL. REV. CODE (1915) c. 65, § 19; N. Y. PENAL LAW, § 664.

¹⁰² See DEL. REV. CODE (1915) c. 65, § 34 *as am'd*; CAL. CIV. CODE (1931) § 346, *as am'd* 1933.

¹⁰³ There are also statutes authorizing the formation of business enterprises on a mutual or cooperative rather than a capital-stock basis, but, except in banking, insurance, and agriculture, such enterprises have never become an important factor in the economic life of this country.

¹⁰⁴ The provision of the New York Banking Law expressly providing for directors' liability to stockholders was exceptional.

¹⁰⁵ Kan. Laws 1911, c. 133. Even before that date a number of states had subjected the issue of securities in railroads and other public utilities to a substantial measure of administrative control, but this control, while tending to safeguard the investor, was instituted primarily for the purpose of protecting the consumer against the injurious effects of improper financial practices on rates and service.

¹⁰⁶ Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C.A. §§ 77a-77aa (Supp. 1935) *as am'd* 1934; Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C.A. §§ 78a-77jj (Supp. 1935).

¹⁰⁷ Notably by § 78m relating to corporate accounting, § 78n relating to solicitation of proxies, and § 78p relating to officers' and directors' profits through dealing in the stock of their corporations. The relation of some of these matters to the constitutional powers of the federal government is rather tenuous.

¹⁰⁸ 48 Stat. 912 (1934), 11 U.S.C.A. §§ 205, *as am'd* 1935, and 207.

¹⁰⁹ See Dodd, *Reorganization Through Bankruptcy: A Remedy for What?* (1935) 48 HARV. L. REV. 1100.

¹¹⁰ ANGELO AND AMES, CORPORATIONS (1st ed. 1832). For earlier American writings on corporations, see 1 SWIFT, CONNECTICUT SYSTEM OF LAWS (1795) bk. 2, c. 9; 2 KENT, COMMENTARIES (1827) lecture 33.

¹¹¹ Bank of United States v. Dandridge, 12 Wheat. 64 (U.S. 1827); Chestnut Hill and Spring House Turnpike Co. v. Rutter, 4 S. & R. 6 (Pa. 1818).

¹¹² See ANGELO AND AMES, *op. cit.* *supra* note 110, cc. 7, 8, 12.

¹¹³ See Spear v. Grant, 16 Mass. 9 (1819); Myers v. Irwin, 2 S. & R. 368, 371 (Pa. 1816).

¹¹⁴ Chester Glass Co. v. Dewey, 16 Mass. 94 (1819) (purchaser of goods from corporation cannot set up *ultra vires*); Leazure v. Hillegas, 7 S. & R. 313 (Pa. 1821) (bank which has made *ultra vires* purchase of land can pass title to its grantee); The Banks v.

Poitiaux, 3 Rand. 136 (Va. 1825) (bank which has made *ultra vires* purchase of land may get specific performance against its vendee).

²²⁵ But *cf.* New York Firemen Ins. Co. v. Ely, 5 Conn. 560 (1825), adopting the special capacity theory of corporate powers and treating a note which an insurance company had discounted as void where the company had no banking powers. See also Marshall, C. J., in Head v. Providence Ins. Co., 2 Cranch 127, 167 (U. S. 1804), a corporation "may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." But *cf.* Bulkley v. Derby Fishing Co., 2 Conn. 252 (1817).

²²⁶ See Dutchess Cotton Manufactory v. Davis, 14 Johns. 238, 245 (N.Y. 1817).

²²⁷ Portsmouth Livery Co. v. Watson, 10 Mass. 91 (1813); Silver Lake Bank v. North, 4 Johns. Ch. 370 (N.Y. 1820).

²²⁸ Garnishment of the property of a foreign corporation had been refused in New York [McQueen v. Middletown Mfg. Co., 16 Johns. 5 (N.Y. 1819)], but allowed in Pennsylvania. Bushel v. Commonwealth Ins. Co., 15 S. & R. 173 (Pa. 1827). Two courts, in cases involving religious corporations, had held that a foreign corporation could not be made a party defendant. Peckham v. North Parish in Haverhill, 16 Pick. 274 (Mass. 1834); Nash v. Rector etc. of Evangelical Lutheran Church, 1 Miles 78 (Pa. 1835).

²²⁹ *Ex parte* Holmes, 5 Cowen 426 (N.Y. 1826).

²³⁰ Commonwealth v. Arrison, 15 S. & R. 127 (Pa. 1826).

²³¹ This rule was first laid down in Andover and Medford Turnpike Co. v. Gould, 6 Mass. 40 (1809), a case dealing with a corporation without fixed capital or par value, and was later applied to par value shares. But *cf.* Hume v. Winyaw and Wando Canal Co., 4 Am. Law Mag. 92 (S.C. 1826) (shareholder who fails to pay assessment held liable to an unpaid creditor despite a by-law providing that failure to pay resulted in forfeiture of the delinquent's shares).

²³² Salem Mill Dam Corp. v. Ropes, 6 Pick. 23 (Mass. 1827).

²³³ Franklin Glass Co. v. Alexander, 2 N. H. 380 (1821).

²³⁴ Gray v. Portland Bank, 3 Mass. 363 (1807).

²³⁵ See Drinker, *The Preemptive Right of Shareholders to Subscribe to New Shares* (1930) 43 HARV. L. REV. 586.

²³⁶ See Bank of Utica v. Smalley, 2 Cowen 770 (N.Y. 1824); United States v. Vaughan, 3 Binney 394 (Pa. 1811); *cf.* Marlborough Mfg. Co. v. Smith, 2 Conn. 579 (1818) (unregistered transferee not liable for assessments).

²³⁷ Sargent v. Franklin Ins. Co., 8 Pick. 90 (Mass. 1829); see Shipley v. Mechanics' Bank, 10 Johns. 484, 485 (N.Y. 1813).

²³⁸ Sargent v. Franklin Ins. Co., *supra* note 127.

²³⁹ People v. Throop, 12 Wend. 183 (N.Y. 1834).

²⁴⁰ See Robinson v. Smith, 3 Paige 222, 231 (N.Y. 1832).

²⁴¹ 3 Mason 308 (C.C. Me. 1824).

²⁴² Dartmouth College v. Woodward, 4 Wheat. 518 (U.S. 1819).

²⁴³ Bank of the United States v. Deveaux, 5 Cranch 61 (U.S. 1809).

²⁴⁴ The importance of the doctrine of *ultra vires* has been still further reduced in several important jurisdictions by statutes which go far to eliminate *ultra vires* as a defense. See, e.g., CAL. CIV. CODE (1931) § 345; ILL. REV. STAT. (Cahill, 1933) c. 32, § 80.

²⁴⁵ See Isaacs, *The Promoter—A Legislative Problem* (1925) 38 HARV. L. REV. 887.

²⁴⁶ Although much of the law applicable to transfer of shares has been given statutory

form by the UNIFORM STOCK TRANSFER ACT, important corporation states, including Delaware, have not adopted that act.

¹³⁷ See the reorganization amendments to the FEDERAL BANKRUPTCY LAW, *supra* note 108.

¹³⁸ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 (U.S. 1837).

¹³⁹ See *Beer Co. v. Massachusetts*, 97 U. S. 25 (1878); *Butchers' Union Slaughter-House etc. Co. v. Crescent City etc. Slaughter-House Co.*, 111 U. S. 746, 4 Sup. Ct. 652 (1884).

¹⁴⁰ It is often said that the Dartmouth College Case merely led to the insertion of the words "subject to amendment or repeal" in corporate charters, but this is not wholly true. The problem of the scope of a reserved power of amendment, particularly where individual shareholders' rights are concerned, is vitally affected by the theory that a charter is a legislative contract.

¹⁴¹ The due process clause of the Fourteenth Amendment was first held applicable to corporations by the Supreme Court in *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132 (1886).

¹⁴² See HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* (1918). For a more recent extension of the burden on interstate commerce concept, see *Davis v. Farmers Co-operative Equity Co.*, 262 U. S. 312, 43 Sup. Ct. 556 (1923). For the application of the equal protection clause to foreign corporations, see *Southern Ry. Co. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287 (1910); *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U. S. 544, 43 Sup. Ct. 636 (1923).

By its holding in *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314 (U. S. 1853), that a foreign corporation is, by virtue of a presumption that its shareholders are citizens of the state of incorporation, in effect a citizen of that state for diversity of citizenship purposes, and by its subsequent insistence that the states are powerless to prevent foreign corporations from removing cases to the federal courts, the Supreme Court has greatly diminished the judicial power of the states over such corporations.

¹⁴³ The decay of the franchise concept in cases involving private parties only is well illustrated by the willingness of modern courts, apart from a few anachronistic decisions like that in *Rogers v. Guaranty Trust Company of New York*, 288 U. S. 123, 53 Sup. Ct. 295 (1933), to entertain litigation involving the internal affairs of corporations which derive their powers from the grant of another sovereign state. On the other hand, the franchise theory still possesses substantial vitality where the state's powers of taxation and regulation are concerned.

¹⁴⁴ See ENGLISH COMPANIES ACT (1908) § 121, defining a "private company" and stating the manner in which it may become a "public company."

¹⁴⁵ They have, for example, made the position of director attractive by allowing a director to profit in various ways from his position, by upholding transactions between interlocking directors, by making the standard of care required comparatively low, and by permitting contracts relieving directors from liability. They have also upheld stipulations giving to the position of trustee under a corporate mortgage and to that of reorganization manager large privileges and few legal responsibilities.

¹⁴⁶ For some of the difficulties involved see Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?* (1935) 2 U. CHI. L. REV. 194.

¹⁴⁷ Cf. Stone, *The Public Influence of the Bar* (1934) 48 HARV. L. REV. 1; Berle, *For Whom Corporate Managers Are Trustees: A Note* (1932) 45 HARV. L. REV. 1365.

THE EXTENSION OF ADMIRALTY JURISDICTION AND THE GROWTH OF SUBSTANTIVE MARITIME LAW IN THE UNITED STATES SINCE 1835

GEORGE C. SPRAGUE

THE source of admiralty jurisdiction in the United States is the constitutional grant of power.¹ By that document the federal courts were given all the jurisdiction in admiralty and maritime cases previously exercised both by the Confederation and by the individual states.² The Judiciary Act of 1789³ contained the only restriction upon such jurisdiction in the famous "saving" clause. But the extent of this grant of power and the breadth of the jurisdiction given to the federal courts in admiralty was not comprehended until over half a century later.⁴

The sources of the substantive maritime law as applied in admiralty in the United States are many. Originally it consisted of the "system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies."⁵ But this system has been added to by the court's adoption of principles from the general maritime law,⁶ by statutory extensions by Congress,⁷ and by the adoption and enforcement of rights and remedies provided by state statutes. This extension of the substantive maritime law has gone hand in hand with that of admiralty jurisdiction. Both fall within the period under discussion.

The subject may be discussed conveniently under four general headings, as follows:

I. Judicial occupation of new fields of jurisdiction previously thought to be outside the constitutional grant.

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II. Adoption by admiralty of principles of the general maritime law and of other bodies of law.

III. Enforcement in admiralty of rights created by state statutes where the subject is maritime and the rights supplement the substantive maritime law and do not conflict with any essential feature thereof.

IV. Federal statutory extensions adopted under the implied power of Congress "to alter, qualify or supplement" the body of admiralty law "as experience or changing conditions may require."

I

Although Justice Story in his famous opinion in *De Lovio v. Boit* in 1815 while on circuit⁸ held that the constitutional grant to the federal courts referred to the admiralty jurisdiction "as acknowledged and exercised in the United States at the American Revolution" and was not restricted either by the statutes of Richard II⁹ or limitations laid upon the English Court of Admiralty by the jealousy of the common-law judges in the seventeenth century, many years elapsed before the Supreme Court showed a disposition to go thus far.¹⁰

In 1825 the Supreme Court affirmed a decree of the Circuit Court, which dismissed a libel for seaman's wages for lack of jurisdiction because the voyage on which he served took place on the Ohio and Missouri rivers above the ebb and flow of the tide, saying that for this reason "in no just sense, can the wages be considered as earned in a maritime employment."¹¹

In 1833 the Court upheld the admiralty jurisdiction of a libel *in rem* for repairs to a steamboat because the work, having been done at New Orleans, was within the ebb and flow of the tide, although the steamboat was to be used above tidewater.¹²

In 1837 the Court, on the authority of steamboat *Thomas Jefferson*, reversed a decree for possession of a vessel and for wages due to and advances made by a master, because it had no juris-

diction where the vessel plied between New Orleans, which was within the ebb and flow of the tide, and ports that were above tidewater.²³

In 1838 the Court on a certified question from the Circuit Court for the Southern District of New York held that an indictment for stealing cargo from a wrecked vessel lying above high-water mark could not be sustained under the admiralty jurisdiction.²⁴

In 1847 the Court, with three judges dissenting, sustained the admiralty jurisdiction of a libel for collision damage occurring *infra corpus comitatus* but within the ebb and flow of the tide, it being impliedly conceded that, had the collision occurred above tidewater, jurisdiction would have been denied.²⁵

In 1848 the Court sustained jurisdiction of admiralty of a contract of affreightment on the ground that it was a maritime contract "and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of the tide."²⁶

Thus stood the law at the time of the decision of the Court in *The Genesee Chief* in 1851,²⁷ a case which involved a collision on Lake Ontario. In 1845 Congress had passed a statute giving the United States district courts

"the same jurisdiction in matters of contract and tort, arising in, upon, or concerning, steamboats and other vessels of 20 tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States."²⁸

The *Genesee Chief* was libeled under this act and her claimants appealed to the Supreme Court from a decree rendered against her, contending that the act was unconstitutional because

the constitutional grant of admiralty jurisdiction did not extend to cases arising above tidewater and Congress could not so extend it by legislation.¹⁹

The Court held the act to be constitutional under the admiralty clause²⁰ of the Constitution on the ground "that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted. . . . The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction as known and understood in England and this country at the time the Constitution was adopted was confined to the ebb and flow of the tide." The Court admitted this to be the fact but concluded that, in England and the original Colonies, tidewater was synonymous with navigability and merely meant a public navigable stream, and that the true test was whether or not the act occurred upon "public navigable waters." The Court held that the "tidewater test" of navigability was insufficient for the Great Lakes and the western rivers.

"It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States" (457).

*Steamboat Thomas Jefferson*²¹ and *Steamboat Orleans*²² were expressly overruled.

At the same term the Court in *Fretz v. Bull*²³ affirmed a decree,

below, holding that admiralty had jurisdiction of a collision on the Mississippi above tidewater

"because the court . . . has decided in the case of *The Genesee Chief v. Fitzhugh et al.*, that the constitutional jurisdiction of the United States in admiralty was not limited by tide-water, but was extended to the lakes and navigable rivers of the United States."

No reference was made to the Act of 1845, and the case was clearly beyond its scope. However, the Court itself seems not to have realized the full effect of these two decisions for some years.

In *The Magnolia*, reversing a decree below, which had dismissed for lack of jurisdiction a libel for collision on the Alabama River above tidewater and *infra corpus comitatus*, the Court stated that the Act of 1845 was required to give admiralty jurisdiction over the Great Lakes, which were not navigable from the sea, though such an act was not required to give such jurisdiction over "the great navigable rivers of the West."²⁴

Likewise, in *The Hine v. Trevor* in 1866—a case of collision occurring above tidewater on the Mississippi River—the Court reiterated that the jurisdiction of admiralty on the Great Lakes was governed by the Act of 1845, while that on the interior rivers other than those connecting the Great Lakes was governed by the Judiciary Act of 1789.²⁵ Not until its decision in *The Eagle* in 1868 did the Court reach the true conclusion regarding the effect of its decision in *The Genesee Chief*; namely, that the federal courts in admiralty were given jurisdiction over all public waters in the United States by the constitutional grant and the Judiciary Act of 1789, and that the Act of 1845 was "inoperative and ineffectual."²⁶

Whatever may be thought of the historical soundness of the

reasoning of the Court in *The Genesee Chief* in holding that admiralty has jurisdiction over all public waters of the United States and is not limited to tidewaters, it cannot be denied that the Court showed great wisdom in breaking away from the ancient boundaries of jurisdiction, "which, when applied to our continent, had no foundation in reason."²⁷ To have done otherwise would, indeed, have been "to shock the common sense of the people."²⁸ And this extension of jurisdiction led to uniformity in the substantive law of admiralty such as could not have been secured had jurisdiction of all waters above the ebb and flow of the tide been left to the courts of the separate states.

The ebb and flow of the tide thus having been discarded by the Court as the measure of navigability, a definition of "public navigable waters of the United States" became necessary and was supplied in 1870, as follows:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."²⁹

In 1883 a canal used as "a highway for commerce between ports and places in different states . . . even though the canal is wholly artificial, and is wholly within the body of a state, and subject to its ownership and control" was held to be "public water of the

United States, and within the legitimate scope of the admiralty jurisdiction conferred by the constitution," irrespective of whether or not the ships involved were engaged in interstate commerce at the time.³⁰

While it was thus extending the jurisdiction of admiralty to all cases occurring upon navigable waters of the United States, the Court was likewise restricting the jurisdiction of the state courts over such cases by its interpretation of the "saving clause" in the Judiciary Act.³¹ The words "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it" were properly interpreted by the Court as restricting such suits in the state courts to actions *in personam*, reserving solely to the federal courts in admiralty jurisdiction of all actions *in rem*. In 1866 the Court reversed a state court judgment against a ship under a state statute purporting to give an action *in rem* for breach of a maritime contract of passenger carriage,³² and at the same term reversed for lack of jurisdiction a judgment *in rem* in a state court against a ship for collision damage.³³ In 1868 the Court held unconstitutional and void a state statute that gave a lien on a ship for breach of a contract of affreightment and provided an action *in rem* to enforce the same.³⁴

The Court, having found that admiralty jurisdiction in torts depended upon whether or not the *locus* of the tort was upon navigable waters of the United States, was soon called upon to determine precisely what evidentiary facts were necessary to show this. *The Plymouth* involved damage done to a wharf and to shore warehouses by fire negligently started on board a vessel anchored in navigable waters of the United States. The owners of the damaged shore property filed a libel *in personam* against the vessel owner and attached, under a clause of foreign attachment, another vessel owned by the latter. The Court affirmed the

decree below, dismissing the libel for lack of jurisdiction. The opinion said:

"Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.

"We can give, therefore, no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board of a vessel, except as evidence that it originated on navigable waters—the Chicago River; and as we have seen the simple fact that it originated there, but, the whole damage done upon land, the cause of action not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction. The negligence, of itself, furnishes no cause of action; it is *damnum absque injuria*. . . . The answer is, as already given: the whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends—on the high seas or navigable waters."³⁵

The converse of the rule of *The Plymouth* naturally followed; namely, that where a vessel is itself damaged in collision with a bridge, pier, or other land structure which is shown to be an obstruction to navigation extending into navigable waters without authority, the tort is maritime because the damage is suffered on navigable waters. In such a case admiralty has jurisdiction of a libel *in personam* against the owners of the land structure,³⁶ although not of a libel *in rem* against the structure, because an *in rem* action can only be founded upon a maritime lien which "cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind."³⁷

Having precisely defined the admiralty jurisdiction in torts as depending solely upon locality, the Court proceeded to wipe out much of the former confusion regarding jurisdiction of ad-

miralty over contracts by determining that such depended upon the maritime nature of the contract rather than upon the place where it was entered into or was to be performed.³⁸ Certain contracts relating to vessels, however, consistently have been held to be nonmaritime because unrelated to navigation, transportation, or perils of the sea. Among these are contracts to build,³⁹ mortgage,⁴⁰ and sell a vessel.⁴¹

The jurisdiction of admiralty over crimes was extended by following the principle of *The Genesee Chief*, which dealt with jurisdiction over torts. In *United States v. Flores*⁴² the court reversed a judgment dismissing an indictment for murder for lack of jurisdiction. The murder was allegedly committed by the prisoner on board the American steamship *Padsnay*, then at anchor at the port of Matadi, Belgian Congo, several hundred miles up the Congo River, while the vessel was tied up to the shore by cables and was discharging cargo. The prisoner was put in irons and brought back to Philadelphia, the first American port of call, where he was delivered up to the United States court and indicted under Section 272 of Criminal Code.⁴³ The court held that the offense charged was

"within the admiralty and maritime jurisdiction of the United States. . . . In the absence of any controlling treaty provision, and any assertion of jurisdiction by the territorial sovereign, it is the duty of the Courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law."

II

A large part of the substantive maritime law administered in admiralty has from the beginning consisted of

"certain principles of equity and usages of trade which general convenience and a common sense of justice have established in all the

commercial countries of the world to regulate the dealing and intercourse of merchants and mariners in matters relating to the sea."⁴⁴

These principles and usages were usually applied as the law governing the case because they were the usages and principles known here and followed by shipping men. In addition, the Court has oftentimes expressly adopted from the general maritime law as known in other maritime countries principles and usages to supplement and round out our own substantive maritime law and, in some instances, to modify existing law.⁴⁵

The most interesting of these adoptions by admiralty of principles of the general maritime law is in connection with the scope and effect of maritime liens.

The China ⁴⁶ involved a collision, near Sandy Hook, between an English vessel of that name and *The Kentucky*, an American vessel, in which the latter was sunk. The collision admittedly was due solely to the gross negligence of *The China's* pilot, who was in charge of her navigation. The owners of *The Kentucky* libeled *The China in rem* and the claimants of *The China* denied liability on the ground that the vessel had been compelled to take the pilot by virtue of the New York statutes; "that he directed all the manoeuvres of the steamer which preceded the collision and that the same was not in consequence of any negligence of her officers or crew."

The Court considered the case very thoroughly because a foreign vessel was involved; it found that the New York statute provided for compulsory pilotage; it also found that under the English law the ship was not liable *in rem* where the negligence was that of a compulsory pilot. It refused to follow the English rule, however, or to sustain *The China's* position that "one shall not be liable for the tort of another imposed upon him by the law and who is therefore not his servant or agent." It held that

the purpose of the pilotage statute was to furnish a supply of trained and skillful seamen as pilots acquainted with local waters for the use of foreign vessels entering the port; that, as an inducement for these men adequately to prepare themselves for their duties, the statute required all foreign ships to take them when entering and leaving port; that such a pilot's services, as much as those of the captain and crew, were for the benefit of the vessel; that he served and was paid by the owner, and that the master had a right and duty to interfere if the pilot were intoxicated or manifestly incapable of performing his work. It, therefore, adopted the principle of the general maritime law that the wrongdoing ship was impressed with a maritime lien by the collision and was, therefore, liable *in rem* for damages caused thereby, although the negligence was that of one who was not a servant of the owner. It affirmed the decree below, condemning the ship.

The Court in reaching this important conclusion said:

"The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors. *The Phoebe*, Ware 273; *The Creole*, 2 Wallace, Jr., 519.

"The maxim of the civil law—*sic utere tuo ut non laedas alienum*—may, however, be fitly applied in such cases as the one before us. The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond

by payment—especially if the amount recovered were large. Thus, where the injury was the greatest, there would be the greatest danger of a failure of justice. According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings. Unlike a common law lien, possession is not necessary to its validity. It is rather in the nature of the hypothecation of the civil law. . . .

"The proposition of the appellants would blot out this important feature of the maritime code, and greatly impair the efficacy of the system. The appellees are seeking the fruit of their lien.

"All port regulations are compulsory. The provisions of the statute of New York are a part of the series within that category. A damaging vessel is no more excused because she was compelled to obey one than another. The only question in all such cases is, was she in fault? The appellants were bound to know the law. They cannot plead ignorance. The law of the place makes them liable. This ship was brought voluntarily within the sphere of its operation, and they cannot complain because it throws the loss upon them rather than upon the owners of the innocent vessel. . . .

"Maritime jurisprudence is a part of the law of nations. We have been impressed with the importance of its right administration in this case."⁴⁷

This decision (adopting the rule of the general maritime law) has been consistently followed in this country and has resulted in the development of one of the most distinctive features of our maritime law; namely, "that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her."⁴⁸

A case where the Court adopted what it mistakenly supposed was the rule of the general maritime law was *The General Smith*⁴⁹—a mistake which remained to plague judges, maritime

lawyers, shipping interests, and supply men generally for nearly a hundred years, until it was corrected by statute.⁵⁰ The libel was *in rem*, instituted by a supply man who furnished necessities to the vessel at her home port. A decree for the libelant was reversed, the Court holding there was no lien for necessities so furnished under the general maritime law. No authorities were cited and the proposition was stated baldly without discussion, as follows:

"Where repairs have been made, or necessities have been furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem*, in the admiralty, to enforce his right. But in respect to repairs and necessities in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied, unless it is recognized by that law."

In *The Lottawanna*,⁵¹ the question involved in *The General Smith* was raised again and an attempt was made to get the Supreme Court to overrule that case on the ground that it was based upon an erroneous conception of the general maritime law, which actually gave a lien on the ship for supplies furnished in her home port as well as in foreign ports. But the Court declined to do this, holding that the United States had a maritime law of its own and that upon the subject of maritime liens for supplies this was represented by *The General Smith*.⁵²

Admiralty has also adopted many principles purely equitable in origin, has applied them to subjects within its jurisdiction, and has given effect to equitable defenses although it has no jurisdiction of libels demanding affirmative equitable relief.⁵³

Admiralty has likewise adopted some principles from the common law, as in the case of accidents to maritime workers other than members of the crew. Of these cases Justice Brandeis

in his dissenting opinion in the *State of Washington v. W. C. Dawson and Co.* said:

"The admiralty court, instead of extending to these persons this characteristic feature, [liability without negligence] borrowed the rule of negligence from the common-law courts, making modifications conformable to its views of justice."⁵⁴

And see also Justice Holmes's dissenting opinion in *Knickerbocker Ice Co. v. Stewart* in which he said:

"But somehow or other the ordinary common law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several States, is not accepted, I can only say, I do not know how, unless by the fiat of the judges."⁵⁵

III

The right of the states to supplement the general maritime law by legislation, where Congress has remained silent, has been frequently admitted by the Supreme Court but nowhere precisely defined. This right appears to be based upon the constitutional grant of admiralty jurisdiction⁵⁶ and the Judiciary Act of 1789.⁵⁷ Where such state legislation supplements the substantive maritime law and does not conflict with any essential feature thereof, admiralty will give effect to it and sustain libels founded thereon if the subject matter is maritime. But again, as in instances previously referred to relating to the general maritime law, it will be seen that this is merely a matter of adoption by the Supreme Court of such legislation as it deems appropriate. The extension of admiralty jurisdiction in this manner, as well as by Congressional legislation and adoption of rules of the general maritime law, remains a judicial function.⁵⁸

The most interesting cases where adoption of state statutes

changed the general maritime law are those relating to wrongful death. *The Harrisburg*⁵⁹ was an action *in rem* for the death of the first officer of the schooner Marietta Tilton in a collision with *The Harrisburg*, a vessel documented in Pennsylvania. The collision occurred in local territorial waters of Massachusetts. The statutes of Pennsylvania as well as those of Massachusetts gave an action for wrongful death, to be brought within one year, but neither provided for a lien upon the wrongdoing vessel. Suit was not brought until five years after the death. The District Court of Pennsylvania gave a decree for libelant which was reversed by the Supreme Court. The Supreme Court discussed various district-court cases in which libels for wrongful death had been sustained and found that they were divided into two classes: the first, those in which no state statute was involved but where the courts had held that the common-law rule refusing liability for wrongful death was not founded in good reason and was contrary to natural equity and the general principles of law,⁶⁰ and the second, those where a state statute gave an action for wrongful death.⁶¹ Having held, subsequent to the decisions referred to in the first class, that the common-law rule providing "no civil action lies for an injury which results in death" was applicable to the United States,⁶² the Supreme Court said that as

"... it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. . . .

"This brings us to the second branch of the question, which is whether, with the statutes of Massachusetts and Pennsylvania above referred to in force at the time of the collision, a suit *in rem* could be maintained against the offending vessel if brought in time. About this

we express no opinion, as we are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . It would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."⁶³

*The Corsair*⁶⁴ was a suit *in rem* under a Louisiana statute giving an action for wrongful death, to be brought in one year. Exceptions were sustained to the libel but libelant was allowed to amend by joining the owners of the ship as parties respondent, whereupon exceptions were sustained to the amended libel because the admiralty rules did not allow such a joinder and because the one-year limitation had expired before the amendment. The Supreme Court examined the situation with special reference to libelant's right to maintain the libel *in rem*, and held that there could be no such suit unless the statute gave a lien. Of the Louisiana statute it said:

"Evidently nothing more is here contemplated than an ordinary action according to the course of the law as it is administered in Louisiana. There is no intimation of a lien or privilege upon the offending thing, which, as we have already held, is necessary to give a court of admiralty jurisdiction to proceed *in rem*."⁶⁵

*The Hamilton*⁶⁶ involved death actions caused by a collision on the high seas between *The Hamilton* and *The Saginaw*, both

Delaware vessels. The Delaware statute gave an action for wrongful death without a lien and the court held this applied even though the collision occurred outside the territorial waters of the state. After discussing the source of the state's power to pass the legislation,⁶⁷ the Court in its opinion by Justice Holmes proceeded to say:

"So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would seem not to matter whether the accident happened near shore or in mid-ocean, notwithstanding some expressions of doubt. . . .

"We pass to the other branch of the first question—whether the state law, being valid, will be applied in the Admiralty. Being valid, it created an *obligatio*—a personal liability of the owner of the Hamilton to the claimants. Slater v. Mexican National R.R. Co., 194 U.S. 120, 126. This, of course, the Admiralty would not disregard, but would respect the right when brought before it in any legitimate way. Ex parte McNeil, 13 Wall. 236, 243. It might not give a proceeding *in rem*, since the statute does not purport to create a lien. It might give a proceeding *in personam*. The Corsair, 145 U.S. 335, 347. If it gave the latter, the result would not be, as suggested, to create different laws for different districts. The liability would be recognized in all. Nor would there be produced any lamentable lack of uniformity. Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit."

*La Bourgogne*⁶⁸ involved death in a collision on the high seas between two ships of different nationalities—The Cromartyshire (British) and La Bourgogne (French). La Bourgogne having been found at fault, the French statute giving an action for wrongful death was applied, extending the doctrine of *The Hamilton*.

In *Western Fuel Co. v. Garcia*⁶⁹ the Supreme Court affirmed a

decree in admiralty, based upon a California statute, for the wrongful death of a stevedore which occurred while he was working on board a Norwegian vessel within local territorial waters of the state. Likewise, in *Great Lakes Dredge and Dock Co. v. Kierejewski*,⁷⁰ the Court affirmed a decree in admiralty for wrongful death, based upon the New York death statute, where decedent was engaged in making repairs to a damaged scow in territorial waters of the state.

The right to sue for wrongful death, given by state statutes that the admiralty adopted, has become almost inextricably entangled with the right to workmen's compensation given by similar statutes but which the admiralty generally has refused to adopt. The latter question was first raised in *Southern Pacific Co. v. Jensen*.⁷¹ In this case a stevedore employed in discharging cargo from a vessel lying alongside the dock was accidentally killed during his labors on the ship. An award of compensation, granted by the Compensation Commission under the provisions of the New York Workmen's Compensation Law, was approved by the Appellate Division and affirmed by the Court of Appeals.⁷² Upon writ of error to the Supreme Court the judgment was reversed by a division of five to four. The Court's opinion by Justice McReynolds, after discussing the constitutional provisions and the right of the state legislatures in certain instances to alter and supplement the general maritime law, went on to say:

"The work of a stevedore, in which the deceased was engaging, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 59, 60.

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other

states may do likewise.^[73] The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. . . . The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed."

The historic dissenting opinion of Justice Holmes in this case called attention to the power of state legislatures over admiralty and, after referring expressly to the state death statutes, said:

"And as such a liability can be imposed where it was unknown not only to the maritime but to the common law, I can see no difference between one otherwise constitutionally created for death caused by accident and one for death due to fault. . . .

"As to the spectre of a lack of uniformity I content myself with referring to the *Hamilton* (Old Dominion S.S. Co. v. *Gilmore*) 207 U.S. 398, 406.^[74] The difficulty really is not so great as in the case of interstate carriers by land, which, 'in the absence of Federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits.' *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U.S. 352, 408 and cases cited."

Justice Holmes then protested at the action of the Court in adopting such part of a state's legislation relating to admiralty as it desired, and rejecting the balance, in the following words:

"No doubt there sometimes has been an air of benevolent gratuity in the admiralty's attitude about enforcing state laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and if a claim depending upon a state statute is enforced, it is because the state had constitutional power to pass the law. Taking it as

established that a state has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source, that is, from the United States. There is no such law. The maritime law is not a *corpus juris*—it is a very limited body of customs and ordinances of the sea."

Subsequent to the decision in *Jensen v. Southern Pacific*, Congress amended the Judicial Code relating to the jurisdiction of the district courts so as to include within the saving clause the words "and to claimants the rights and remedies under the workmen's compensation law of any state."⁷⁵ In *Knickerbocker Ice Co. v. Stewart*⁷⁶ the Supreme Court held this amendment unconstitutional in so far as it affected deaths and injuries of maritime workers on navigable waters, reversing a decision of the New York Court of Appeals which had affirmed an award, under the New York Workmen's Compensation Law, to the widow and minor children of a bargeman who fell into the Hudson River from his barge and was drowned. Again the decision of the Court was by a division of five to four, the decision being based upon the danger of lack of uniformity in admiralty, the grounds of unconstitutionality given being the attempted transfer of its legislative power by Congress to the states.

Subsequently, Congress again amended the Judicial Code, adding to the saving clause the words "and to claimants for compensation for injuries to, or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory or possession of the United States, which rights and remedies when conferred by such law shall be exclusive."⁷⁷ This amendment was held unconstitutional in *State of Washington v. W. C. Dawson and Co.*,⁷⁸ again by a divided court and upon the same

reasoning as in *Knickerbocker Ice Co. v. Stewart*. The Court expressly stated that Congress had the power to enact a maritime compensation act if it chose, a hint that was soon acted upon.⁷⁹

The Supreme Court has not closely followed *Southern Pacific v. Jensen* except in cases involving strictly maritime pursuits, such as stevedoring and ship repairs on navigable waters.⁸⁰ A so-called doctrine of "local concern" has been adopted to avoid the "spectre of uniformity" that occasioned the decision in *Southern Pacific v. Jensen*, and to sustain workmen's compensation awards in numerous cases. This doctrine was evolved in *Grant-Smith Porter Co. v. Rohde*,⁸¹ in which case a carpenter who was injured while working on an uncompleted vessel lying in navigable waters sued in admiralty and obtained a decree. The Circuit Court of Appeals certified to the Supreme Court the question whether or not the state Workmen's Compensation Law applied. The Court held that the carpenter's contract was nonmaritime as the vessel was uncompleted, and found that his employer carried workmen's compensation insurance. It therefore answered that while admiralty had jurisdiction because the injury occurred on navigable waters, nevertheless the exclusive feature of the Oregon Workmen's Compensation Act applied and abrogated the right to sue for damages in an admiralty court because libellant's employment had no direct relation to navigation or commerce, the injury suffered was within the state providing compensation as an exclusive remedy and the parties by agreeing thereto had shown an intention not to contract with a view to maritime law, and it was a matter of local concern that "cannot materially affect any rules of the sea whose uniformity is essential."⁸²

This "rule of local concern" seems to be little more than a device to permit application of state workmen's compensation acts to those maritime cases where it does not interfere with the uniformity that the Supreme Court believes is essential in cases that

have "a direct and intimate connection with navigation and commerce."

There are other instances where admiralty has adopted rights or remedies created by state statutes, which, for the sake of brevity, will be merely mentioned. Among these are liens upon a vessel in her home port for repairs and necessities⁸³ and the creation of local pilots' associations which all foreign vessels are required to use while in American ports and which fix the fees of such pilots.⁸⁴ The Supreme Court has held constitutional the arbitration statute of the state of New York as applied to maritime contracts in litigation in the courts of that state,⁸⁵ although the District Court in admiralty sustained exceptions to a defense in an answer pleading this statute to a libel arising out of the same facts on the ground that it was not within the power of a state to regulate the procedure and practice in admiralty.⁸⁶ The federal courts have generally declined to apply the provisions of state statutes to maritime cases where they conflict with or are a burden upon the general maritime law.⁸⁷

IV

That Congress has the power to "alter, qualify or supplement" the admiralty law is now well settled. This power is implied from Article III, Section 2, of the Constitution because, as Justice Bradley, speaking for the Supreme Court, said, "It cannot be supposed that the framers of the Constitution contemplated that the law [maritime] should forever remain unalterable."⁸⁸

For brevity's sake, the principal statutory changes made by Congress in the admiralty and in maritime law will be merely outlined, without detailed discussion.

A. Limitation of Shipowners' Liability

As a result of the Supreme Court's decision in *The Lexington*,⁸⁹ holding a shipowner fully liable for loss, by fire, of gold coin

shipped on the vessel, shipowners became very apprehensive and caused to be introduced in the Senate a bill to limit their liability. The bill was stated by its sponsor, Senator Hamlin, to be "predicated on what is now the English law, and it is deemed advisable by the committee on Commerce that the American marine should stand at home and abroad as well as the English marine."⁹⁰ There was little debate and the act was passed on March 3, 1851.⁹¹ The statement that this act merely reenacted the English law is inaccurate; it materially differed therefrom.⁹²

The material provisions of the act were that a shipowner should not be liable for loss or damage to goods shipped on board his vessel by fire happening "to or on board the said ship or vessel unless such fire is caused by the design or neglect of such owner";⁹³ that the shipowner should not be liable to shippers of gold and other valuable goods who do not disclose the true character and value thereof in writing on the bill of lading;⁹⁴ that the liability of a shipowner for any loss, embezzlement, or destruction of property shipped on board his vessel, or for loss, damage, or injury by collision, or for any other loss or damage "incurred without privity or knowledge of such owner" should not exceed the value of such owner's interest in such vessel and "her freight then pending";⁹⁵ that, in such limitation of liability proceedings, if the value of the ship and freight was insufficient to pay all claimants they should share pro rata, and that the shipowner might comply with the act by transferring his interest in the vessel and freight to a trustee, whereupon all his liability should cease;⁹⁶ that demise charterers should be deemed owners within the meaning of the act;⁹⁷ that nothing in the act contained should free the master, officers, and mariners from personal responsibility for embezzlement, damage, or injury to goods.⁹⁸

In 1884 Congress added debts and liabilities of the ship and nonmaritime torts to the category of things for which the ship-

owner could limit liability under the act.⁹⁹ And in 1935¹⁰⁰ it was enacted that the shipowner's liability in the event of loss of life or personal injury without privity or fault should not be less than \$60 per ton of the ship's gross tonnage, and that in case of such loss of life or personal injury the knowledge of the master or of the superintendent or managing agent of the owner "at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel."

The constitutionality of the Limitation of Ship Owners' Liability legislation was declared, in the early cases, to be based on the commerce clause of the Constitution,¹⁰¹ but in later decisions¹⁰² was more properly held to be founded on the judiciary clause.¹⁰³ As judicially expressed, Congress by this legislation has adopted from the general maritime law the principle of limited liability. Prior to 1851, "one of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our maritime code. We cannot doubt its power to do this."¹⁰⁴

Foreign shipowners may limit their liability under this act where suits have been brought against them here.¹⁰⁵

B. *The Harter Act*¹⁰⁶

Prior to the enactment of this legislation, "common carriers, by land or sea, could not by any form of contract exempt themselves from responsibility for loss or damage arising from negligence of their servants, and . . . any stipulation for such exemption was void as against public policy; although the courts in England and in some of the States held otherwise."¹⁰⁷

The act was an attempt to regulate bills of lading in a manner fair both to shipper and to shipowner. It made it unlawful for a shipowner to insert in a bill of lading any stipulation exempting

himself "from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise";¹⁰⁸ or to insert any agreement whereby the owner's obligation "to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make such vessel seaworthy . . . shall in anywise be lessened, weakened, or avoided";¹⁰⁹ that if the owner of any vessel carrying property "shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel. . . ."¹¹⁰ These are the principal features of the act.¹¹¹ Sections 1 and 2 apply to transportation of goods "from or between ports of the United States and foreign ports"; Section 3 to such transportation "to or from any port in the United States of America."¹¹²

The act is purely bill-of-lading legislation, regulating the relations between a ship and her cargo.¹¹³ The great dispute between the cases has been over the question of fact—whether a negligent act is one of management and navigation of the ship, for which the owner is free from liability upon showing that he exercised due diligence to make the vessel seaworthy, or is one of care and custody of the cargo for which he cannot exempt himself from liability even by stipulation. The boundary between the two is very shadowy and the same act in one case may be held management of the ship and in another care and custody of the cargo.¹¹⁴ "It is impossible to evolve a rule of law out of a decision declaring that some particular act is one of management or navigation or one of custody or care of the cargo."¹¹⁵

Section 2, prohibiting the inclusion of any bill-of-lading clause lessening, weakening, or avoiding the owner's obligation to "ex-

ercise due diligence . . . to make said vessel seaworthy," has been held to give the owner the affirmative right by proper bill-of-lading stipulation to substitute for the warranty of seaworthiness the exercise of due diligence to make the vessel seaworthy, the effect of which is to free him from liability for latent defects.¹¹⁶

Section 3 is self-executing and does not depend upon any bill-of-lading exception.¹¹⁷ It does not apply until the vessel breaks ground for the voyage,¹¹⁸ for until then the officers and crew are deemed to be under the owner's control. The condition specified by the section, namely, "due diligence to make the said vessel in all respects seaworthy," upon compliance with which the owner obtains freedom from liability for damage due to negligent navigation or management, is an absolute condition precedent and must be strictly fulfilled. The burden of proving compliance with this condition is upon the shipowner¹¹⁹ and "is not left to any presumption in the absence of proof." Failure to exercise such "due diligence" even in a respect not causally connected with the subsequent negligent navigation or management will result in the loss of the exemption.¹²⁰

The Harter Act is without doubt the most notable piece of maritime legislation adopted in this country. It was in every sense indigenous to the United States. It has aroused great admiration abroad and has been incorporated by reference into countless foreign bills of lading.¹²¹

*C. Act Relating to Liens on Vessels for Repairs, Supplies, or Other Necessaries*¹²²

"The purpose of the act was this: First, to do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or state, but denied where the supplies were furnished in the home port or state. The General Smith, 4 Wheat. 438. Second, to do away with the doctrine

that when the owner of a vessel contracts in person for necessities or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence no lien arises. The *St. Jago de Cuba*, 9 Wheat. 409. Third, to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessities. *Peyroux v. Howard*, 7 Pet. 324. The reports expressly declare that the bill makes 'no change in the general principles of the law of maritime liens, but merely substitutes a single statute for the conflicting state statutes.'"¹²³

The act in its original form provided that "any person furnishing repairs, supplies, use of dry dock and marine railway or other necessities to any vessel whether foreign or domestic" upon order of the owner or a person authorized by him "shall have a maritime lien on the vessel, which may be enforced by suit in rem," without the necessity of proving that credit was given to the vessel;¹²⁴ that "the managing owner, ship's husband, master or any person" to whom her management "at the port of supply is intrusted" "shall be presumed to have authority to procure" such repairs, etc.,¹²⁵ even though such persons were appointed by a charterer, owner *pro hac vice*, or an agreed purchaser in possession of the vessel, but that "nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering . . . was without authority to bind the vessel therefor";¹²⁶ that nothing in the act shall be construed to prevent "a furnisher from waiving his lien, or to effect the existing rules regarding laches or priority or rank of liens";¹²⁷ that all state statutes creating liens on vessels for such repairs, etc., are superseded.¹²⁸

The act has been discussed in a few leading cases. The clause "or other necessities" in Section 1 is limited by the *ejusdem*

generis doctrine.¹²⁹ The "furnisher," to take advantage of the act, must show that he actually or constructively supplied—made delivery of—the goods to the vessel.¹³⁰ He is also required under Section 3 to investigate to see whether the vessel is under a charter or contract of sale by the terms of which the person ordering the supplies is "without authority to bind the vessel."¹³¹ He cannot rely upon presumptions.

D. *Ship Mortgage Act, 1920*¹³²

Prior to this enactment it was well settled that a ship mortgage had "none of the characteristics or attendants of a maritime loan" and that "admiralty had no jurisdiction of a libel to foreclose it or to assert either title or right of possession under it."¹³³ Consequently, a ship mortgage became subordinated to every maritime lien and was exceedingly poor security. The act was passed to encourage investments in shipping by creating a preferred ship mortgage which should give a lien on the ship, having priority over all except certain preferred liens and which could be foreclosed in admiralty.¹³⁴

"Certain prerequisites are provided in the act to be done by the mortgagor or the mortgagee, or both, in order that the benefits of the provision may accrue—for instance: The vessel must be a vessel of the United States of 200 gross tons or upward; the mortgage must include the whole of the vessel; the mortgage must be endorsed upon the vessel's documents; it must be recorded as required, together with the time and date when the mortgage is so endorsed; an affidavit of good faith must be filed with the record; there must be no waiver therein of the preferred status, and the mortgagee must not be an alien. . . . In addition to the above certain duties are imposed by the act upon the mortgagor and master, and penalties are provided for their neglect. Thus, in Section E, the mortgagor is required to retain a certified copy of the mortgage on board, 'to be exhibited by the master to any person

having business with the vessel which may give rise to a maritime lien,' etc.; and the master of the vessel is required, 'upon the request of any such person,' to exhibit, with the documents of the vessel, a copy of the mortgage to such person."¹³⁵

Having complied with the above provisions, the holder of a preferred mortgage obtains a lien upon the mortgaged vessel enforceable "by suit in rem in admiralty,"¹³⁶ in which it has "priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court."¹³⁷ The preferred maritime liens having priority to the preferred mortgage are enumerated as follows:

"(1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage."¹³⁸

As most of these preferred maritime liens are coverable by the usual marine and protection and indemnity insurance which a mortgagee would customarily require the mortgagor to carry on the vessel, this preferred mortgage gives fair security to the investor¹³⁹ where the provisions of the statute have been fully complied with.

The constitutionality of the act was recently upheld by the Supreme Court in *Detroit Trust Co. v. Barlum S.S. Co.*¹⁴⁰ In this case part of the proceeds of the mortgage loan was used for nonmaritime purposes. The Court held that the purpose of the act was to encourage investments in vessels and that to require the mortgagee to see that every part of the loan was used for a maritime purpose on pain of losing his security would discourage rather than encourage such investments. The power of Congress

to give jurisdiction to admiralty over a preferred ship mortgage where it admittedly had no jurisdiction over an ordinary ship mortgage was sustained on the grounds previously referred to.

*E. Recovery for Injury to or Death of Seamen*¹⁴¹

Prior to this enactment, a seaman's remedy for injuries incurred in his employment was restricted to wages, maintenance, and cure whether the injuries were received by negligence or by accident, except where they were due to unseaworthiness of the ship, in which event he was entitled to indemnity;¹⁴² in case of death his personal representatives were limited to the rights given by statute of the state to which the vessel belonged or in whose territorial waters the wrongful act occurred, *supra*. The Seaman's Act of 1916 had sought to change this by providing that in suits for damages due to personal injuries "seamen having command shall not be held to be fellow servants with those under their authority," but the Supreme Court in *Chelentis v. Luckenbach*¹⁴³ held that this did not impose on a shipowner the liability prescribed by the common law for employers of shore labor.

Thereupon the act was amended in 1920. It is popularly known as the "Jones Act." It provides in general that seamen who suffer personal injuries in the course of their employment may elect to sue for damages at law with the right of trial by jury, in which event they are entitled to all modifications of the common-law rights or remedies provided by Railway Employer's Liability Act,¹⁴⁴ and that in cases of death of seamen similar suits at law may be brought by their personal representatives. Jurisdiction is to be in the court of the district in which the defendant employer resides or has his principal office.

The constitutionality of the Act was sustained by the Supreme Court in *Panama R. R. Co. v. Johnson*, on the ground that it did not "withdraw rights of action founded on the new rules from

the admiralty jurisdiction and . . . make them cognizable only on the common law side of the courts. . . ."¹⁴⁵

The Supreme Court, in *International Stevedoring Co. v. Haverly*, held stevedores to be within the term "seamen" as used in this act and entitled to sue their employers thereunder,¹⁴⁶ and this irrespective of whether the accident occurred during employment on an American or on a foreign ship,¹⁴⁷ but this extension has become immaterial since the adoption of Longshoremen's and Harbor Workers' Compensation Act, which provides an exclusive remedy for stevedores against their employers.¹⁴⁸

This act supersedes all state statutes in so far as actions against an employer for death of a seaman are concerned.¹⁴⁹ It is strictly limited to injuries suffered in the course of employment.¹⁵⁰ Actions brought hereunder are subject to the provisions of the Act for Limitation of Shipowners Liability.¹⁵¹ It has been held that the injury must occur on shipboard in order to give the seaman a right to sue hereunder.¹⁵²

*F. Death on the High Seas by Wrongful Act*¹⁵³

Prior to the enactment of this legislation, the maritime law as administered in this country gave no action for wrongful death, but admiralty enforced rights therefor created by state statutes, when the wrongful act occurred in territorial waters of the state giving the right, or upon the high seas when the vessel hailed from a port in such state.

Proposed bills were initiated in Congress immediately following the Titanic disaster and finally eventuated in this legislation.¹⁵⁴ The act provides that "whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State etc.," the personal representative of the decedent may bring a suit in admiralty for "the exclusive benefit of the decedent's wife,

husband, parent, child or dependent relative against the vessel, person or corporation which would have been liable had death not ensued";¹⁵⁵ for "fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought,"¹⁵⁶ such suit to be commenced within two years from the date of such wrongful act;¹⁵⁷ that contributory negligence of decedent shall not bar recovery but shall be taken into consideration by the court and recovery reduced accordingly;¹⁵⁸ that state statutes creating rights of action for death shall not be affected by this act, which shall not apply to the Great Lakes, to territorial waters of any state, or to navigable waters in the Panama Canal Zone;¹⁵⁹ that in the event of death of a plaintiff in a suit in admiralty for personal injuries suffered on the high seas during pendency of such suit, his personal representative shall be substituted and case proceed as under this act.¹⁶⁰ Section 4 provides that wherever the law of a foreign state grants a right of action for such wrongful death "such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding."¹⁶¹

The Supreme Court, in *Lindgren v. United States*, refused to consider, because immaterial to its decision, whether or not this act was affected by the Jones Act relating to suits for death of seamen.¹⁶² The act has been held by the Circuit Court of Appeals of the Second Circuit to be the general maritime law as adopted in the United States and to be applicable to a death in a collision on the high seas between a Spanish steamer and an American bark, due to the fault of the Spanish steamer.¹⁶³

There can be little doubt of its constitutionality, although that point has never been raised in the Supreme Court.¹⁶⁴

Actions for death on the high seas on a ship of a country whose laws give a right therefor should be brought in accordance with

the terms of such law regarding limitation of time and are not subject to limitation of liability under Section 4.¹⁶⁵ If the law of the foreign ship gives no right of action for death, then it is believed this statute would be applied in our courts, especially if the death arose out of a collision in which an American vessel was involved.¹⁶⁶

This act applies to a death due to wrongful act on a vessel on the high seas, to the exclusion of the statute of the state to which the vessel belongs,¹⁶⁷ although such a death within the territorial waters of such state is governed exclusively by the state act.

*G. Longshoremen's and Harbor Workers' Compensation Act*¹⁶⁸

The power of Congress to "alter, qualify or supplement" the maritime law is limited by the requirement that the enactments "when not relating to matters whose existence or influence is confined to a more restricted field, as in *Cooley v. Board of Wardens*, 12 How. 299, 319, shall be co-extensive with and operate uniformly in the whole of the United States."¹⁶⁹ As we have seen, it was for this lack of uniformity that the amendments of Oct. 6, 1917, and June 10, 1922, to the Judicial Code, which added to the "right of a common law remedy" in the saving clause "the rights and remedies under the workmen's compensation law of any state," were declared unconstitutional.¹⁷⁰ The Court then stated that it thought Congress had power to enact a maritime compensation act of "general application." The Longshoremen's and Harbor Workers' Compensation Act of 1927 was the result.

The act has been held constitutional by the Supreme Court¹⁷¹ in an opinion stating that

"in its sphere the statute was designed to accomplish the same general purpose as the workmen's compensation laws of the States. The Act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting from an injury

occurring upon the navigable waters of the United States if recovery through workmen's compensation proceedings may not validly be provided by State Law, and it applies only when the relation of master and servant exists."

Further provisions of the act require employers to secure the payment of compensation to their employees in conformity with the act; provide that such compensation is payable irrespective of fault unless the injury be occasioned solely by the employee's intoxication or his "willful intention to kill himself or another," and that the remedy is exclusive as against the employer, unless he fails to secure payment of the compensation; require the employers to furnish appropriate medical and hospital treatment; and provide a detailed schedule of compensation for disability and for death. Machinery is set up for the administration of the act by deputy commissioners with whom claims are filed and before whom the proceedings are carried on to final order. Review is had in the United States District Court by injunction.

Where the injured employee determines that a person other than his employer is liable in damages, he may elect by giving notice to the deputy commissioner to receive the compensation or to recover damages; if he accepts compensation he may not sue the third party for damages but his employer, who has paid the compensation, may sue and in the event of recovery deduct therefrom his legal fees and costs plus the compensation paid, and pay over the excess to said employee. But the determination of whether or not to sue a third party after the employee has accepted compensation is solely a matter for the employer's judgment and he only can bring the action.³⁷²

The master and crew of a vessel are specifically excepted from this act.

There are other acts of Congress affecting admiralty jurisdiction, substantive law, and procedure which should be mentioned.

Among these are the following: Act adopting International Rules for Navigation at Sea;¹⁷³ The Salvage Act;¹⁷⁴ The Suits in Admiralty Act;¹⁷⁵ The Public Vessels Act;¹⁷⁶ and The United States Arbitration Act.¹⁷⁷ Time does not permit of their discussion.

By refusing at an early date to be bound by ancient and inapplicable limitations of jurisdiction, by a judicious adoption of liberal principles from the general maritime law and from equity, by itself enforcing rights created by state statutes to supplement its own body of law, by suggesting Congressional enactments altering, qualifying, and supplementing its jurisdiction, substantive law, and remedies, admiralty now finds itself possessed of a well-rounded jurisdiction and a comprehensive body of substantive law. Although much still remains to be done fully to round out the system, admiralty is today the best example of our judicial system from the standpoint of liberality, practicality, and substantial justice. This is as it should be, for admiralty administers the law of nations and is the court where we most frequently meet our foreign neighbors.

NOTES

¹ ART. III, § 2. "The judicial power shall extend to all cases of admiralty and maritime jurisdiction."

² *United States v. Flores*, 289 U. S. 137, 147-148, 53 Sup. Ct. 580, 581-582 (1932). The Confederation had jurisdiction over prizes and felonies on the high seas and the states had the balance of admiralty jurisdiction; jurisdiction of the former was given to the federal courts by Art. I, § 8, that of the latter by Art. III, § 2.

³ U. S. STAT. 76. "The district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . ; saving to suitors in all cases the right of a common law remedy where the common law is competent to give it. . . ." *As am'd*, 28 U. S. C. 371 (third par.).

⁴ In the *Blackheath* (1904) 195 U. S. 361, 365 opinion by Justice Holmes: "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history."

⁵ *United States v. Flores*, 289 U. S. 137, 148, 53 Sup. Ct. 580, 582 (1932).

⁶ The Western Maid, 257 U. S. 419, 42 Sup. Ct. 159 opinion by Justice Holmes. "There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules."

⁷ United States v. Flores, 289 U. S. 137, 148, 53 Sup. Ct. 580, 582 (1932).

⁸ C. C. of U. S. Dist. of Mass., 2 Gall. 399, Fed. Cas. No. 3,776 sustaining admiralty jurisdiction of a libel on a policy of marine insurance. The Supreme Court in its opinion in New England Mut. Ins. Co. v. Dunham, 11 Wall. 1 (1870) said: "The learned and exhaustive opinion of Justice Story, in the case of De Lovio v. Boit (1815) 2 Gall. 398, Fed. Cas. No. 3,776 affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition."

⁹ 13 RICH. II, c. 5; 15 RICH. II, c. 3.

¹⁰ Justice Story in De Lovio v. Boit (Fed. Cas. No. 3,776) said: "Considerations and consequences, like those which have been mentioned, cannot but forcibly impress everyone who has examined this subject with accuracy and diligence, and lead to the conclusion (adopted by Dr. Brown) that the jurisdiction of the admiralty depends, or ought to depend, as to contracts, upon the subject matter, i.e. whether maritime or not; and as to torts, upon locality, i.e. whether done upon the high sea, or in ports within the ebb and flow of the tide" (at 440). He likewise called attention to the fact that the commissions of the Crown to the vice-admiralty courts in the Colonies "gave the courts, which were established, a most ample jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas" (at 442).

¹¹ Steamboat Thomas Jefferson, 10 Wheat. (23 U. S.) 428 (1825).

¹² Peyroux v. Howard, 7 Pet. (32 U. S.) 324, 343 (1833). "We think that although the current in the Mississippi, at New Orleans, may be so strong as not to be turned back-wards by the tide; yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it may properly be said to be within the ebb and flow of the tide."

¹³ Steamboat Orleans, 11 Pet. (36 U. S.) 175, 183 (1837). "The true test of its jurisdiction in all cases of this sort is, whether the vessel be engaged, substantially, in maritime navigation; or in interior navigation and trade, not on tide waters. In the latter case there is no jurisdiction."

¹⁴ United States v. Combs, 12 Pet. (37 U. S.) 72, 77 (1838). "Our opinion is that in cases purely dependent upon the locality of the act done it is limited to the sea and to tide waters as far as the tide flows and that it does not reach above high water mark."

¹⁵ Waring v. Clark, 5 How. (46 U. S.) 441 (1847). "Our conclusion is that the admiralty jurisdiction of the courts of the United States extends to tide waters, as far as the tide flows, though that may be *infra corpus comitatus*; . . ."

¹⁶ The Lexington, 6 How. (47 U. S.) 344, 392 (1848).

¹⁷ 12 How. (53 U. S.) 443 (1851).

¹⁸ 5 STAT. 726 (1845), 28 U. S. C. A. § 770 (1935).

¹⁹ It was also contended that the act was unconstitutional as not within the Commerce clause and the Court agreed that it could not be sustained under that clause.

²⁰ Art. III, § 2.

²¹ 10 Wheat. (23 U. S.) 428 (1825).

²² 11 Pet. (36 U. S.) 175 (1837).

²³ 12 How. (53 U.S.) 466, 468 (1851).

²⁴ 20 How. (61 U.S.) 296, 300 (1857). This conclusion of the Court, referred to in the text, is curious in view of the reasoning of the opinion as follows: "The act of 1845 was the occasion and created the necessity for this court to review their former decisions. It might be considered in fact as a declaratory act reversing the decision in the case of the *Thomas Jefferson*. We could no longer evade the question by a judicial notice of an occult tide without ebb or flow as in the case of *Peyroux v. Howard* (7 Pet. 343). The Court were placed in the position, that they must either declare the act of Congress void, and shock the common sense of the people by declaring the lakes not to be navigable waters, or overrule previous decisions which had established an arbitrary distinction, which, when applied to our continent, had no foundation in reason" (at 302).

²⁵ 4 Wall. (71 U.S.) 555 (1866).

²⁶ 8 Wall. (75 U.S.) 15, 25 (1868). "We have now examined it with care, and given to it our best consideration, and are satisfied that, since the decision of the case of *The Genesee Chief*, the court must regard the district courts as having conferred upon them a general jurisdiction in admiralty upon the lakes and the waters connecting them, by the ninth section of the original act of 1789; and the enabling act of 1845, therefore, has become inoperative and ineffectual as a grant of jurisdiction; and, as it was an act, on the face of it, and as intended, in its purpose and effect, to extend the admiralty jurisdiction to these waters, we cannot, without utterly disregarding this purpose and intent, give effect to it as a limitation or restriction upon it. We must, therefore, regard it as obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested." This right of trial by jury in admiralty is still occasionally invoked on the Great Lakes; it only exists as the surviving relic of the Act of 1845.

²⁷ *The Magnolia*, 20 How. (61 U.S.) 296, 302 (1857).

²⁸ *Ibid.*

²⁹ *The Daniel Ball*, 10 Wall. (77 U.S.) 557, 563 (1870). And see *The Montello*, 20 Wall. 430 (1874). But waters lying wholly within a state having no navigable outlet are not subject to admiralty jurisdiction as they are navigable waters of the state and not of the United States. See *United States v. Burlington etc. Ferry Co.* 21 Fed. 331 (S.D. Iowa, 1884); *Stapp v. Clyde* 43 Minn. 192 (1890).

³⁰ *Ex parte Boyer*, 109 U.S. 629, 632 3 Sup. Ct. 434, 435-436 (1884). As to the point that locality upon navigable waters of the United States is the one and only test of admiralty jurisdiction in tort cases and that it is immaterial whether or not the vessels concerned are engaged in Interstate Commerce, see *The Belfast*, 7 Wall. 624, 640 (1868); also *The Commerce*, 1 Black 574 (1861). But prior cases had held that vessels engaged in commerce between ports of the same state were not subject to admiralty jurisdiction. *Allen v. Newberry*, 21 How. 245 (1859); *Maguire v. Card*, 21 How. 248 (1859).

³¹ See note 3 *supra*.

³² *The Moses Taylor*, 4 Wall. (71 U.S.) 411 (1866).

³³ *The Hine v. Trevor*, 4 Wall. (71 U.S.) 555, 568-569, 571 (1866). "It must be taken, therefore, as the settled law of this court, that wherever the District Courts of the United States have original cognizance of admiralty causes, by virtue of the act of 1789, that cognizance is exclusive, and no other court, state or national, can exercise it, with the exception always of such concurrent remedy as is given by the common law. . . . But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an ad-

miralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel. That after a notice, in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the Western States . . . But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal Courts would be defeated." The Court held, however, that under the saving clause a suitor might bring an *in personam* action in a state court against a shipowner and seize his ship under a clause of foreign attachment. And see also *Rounds v. Cloverport Foundry and Machine Co.*, 237 U. S. 303 (1915).

³⁴ *The Belfast*, 7 Wall. (74 U. S.) 624 (1868).

³⁵ 3 Wall. (70 U. S.) 20 (1865). The doctrine of this case, that at least some damage must occur on navigable waters of the United States in order to give admiralty jurisdiction of the tort, has been consistently followed. See *Johnson v. Chicago Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254 (1886), where jurisdiction was declined of a suit for damage done by the jib boom of a towed vessel penetrating a grain warehouse on shore and causing corn to run out into the river; *Phoenix Construction Co. v. S. S. Poughkeepsie*, 212 U. S. 558 (1908), jurisdiction declined of suit for damage done by a vessel to a pipe on the bottom of a navigable river; *The Panoli*, 266 U. S. 433, 45 Sup. Ct. 164 (1925), jurisdiction declined of a suit for damage done by a vessel to a spur dike extending into the Mississippi River for the purpose of improving the channel and aiding navigation. However, admiralty jurisdiction has been sustained, largely for historical reasons, of suits for damages done by a ship to aids to navigation, such as beacons built on piles driven through the water into the ground beneath, but not otherwise connected with the shore, *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46 (1904); *The Raithmoor*, 241 U. S. 166, 36 Sup. Ct. 514 (1916); and mooring dolphins or piling clusters, *Doullut v. United States*, 268 U. S. 33, 45 Sup. Ct. 411 (1925).

³⁶ *Atlee v. Packet Co.*, 21 Wall. (88 U. S.) 389 (1874).

³⁷ *Rock Island Bridge*, 6 Wall. (73 U. S.) 213, 216 (1867).

³⁸ *New England Mutual Insurance Co. v. Dunham*, 11 Wall. (78 U. S.) 1 (1870), in which the court held that the admiralty had jurisdiction of a libel *in personam* to recover for a loss on a policy of marine insurance, thus finally adopting the position taken by Justice Story in 1815 in *De Lovio v. Boit*, note 10, *supra*. The court had previously upheld jurisdiction of a contract of affreightment by water [*The Lexington*, 6 How. (47 U. S.) 344, 392 (1848), cited note 16, *supra*]; also *Morewood v. Enequist*, 23 How. (64 U. S.) 491 (1859), and had held that a passenger ticket for transportation by water was a maritime contract [*The Moses Taylor*, 4 Wall. (71 U. S.) 411 (1866), cited note 32, *supra*].

³⁹ *People's Ferry Co. v. Beers*, 20 How. (61 U. S.) 393 (1857).

⁴⁰ *Bogart v. John Jay*, 17 How. (58 U. S.) 399 (1854). But admiralty has been given statutory jurisdiction of a vessel preferred mortgage made pursuant to the provisions of Ship Mortgage Act approved June 5, 1920 (46 U. S. C. 911 *et seq.*); see *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 55 Sup. Ct. 31 (1934).

⁴¹ *The Ada*, 250 Fed. 194 (C. C. A. 21, 1918).

⁴² 289 U. S. 137; 53 Sup. Ct. 580 (1932).

⁴³ 18 U. S. C. 451. This referred to certain crimes and offenses including murder and provided for their punishment "When committed upon the high seas, or on any other waters within the admiralty or maritime jurisdiction of the United States and out of the jurisdiction of any particular state, or where committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof. . . ."

⁴⁴ *BRNEDICT Admiralty* (4th ed.) § 140. This body of principles and usages is commonly called the general maritime law. Like other laws of nations, the general maritime law "is only so far operative as law in any country as it is adopted by the laws and usages of that country." See *The Lottawanna*, 21 Wall. (88 U. S.) 558, 572 (1874); *The Elfrida*, 172 U. S. 186, 19 Sup. Ct. 146 (1898); *The Western Maid*, 257 U. S. 419, 42 Sup. Ct. 159 (1922).

⁴⁵ The definition of the true limits of maritime law in the early cases was held to be exclusively a judicial question. *The St. Lawrence*, 1 Black 527; *The Lottawanna*, 21 Wall. (88 U. S.) 558 (1874); *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917). But that Congress has implied power to "alter, qualify or supplement" maritime law as administered in our courts, "as experience or changing conditions require," is now well established. *United States v. Flores*, 289 U. S. 137, 148, 53 Sup. Ct. 580 (1932). Congress, acting under this power, has by statute in some instances changed the maritime law in the United States by adopting features of the general maritime law. See the ACT FOR LIMITATION OF VESSEL OWNERS LIABILITY, 9 STAT. 635; 46 U. S. C. 182 *et seq.*; Maritime Necessaries Act of June 23, 1910, 46 U. S. C. 971-975.

⁴⁶ 74 Wall. (74 U. S.) 53 (1868).

⁴⁷ See *United States v. Malek Adhel* 2 How. (43 U. S.) 209 (1844), involving the forfeiture of a vessel for piracy by the crew without knowledge or fault of the owners, in which the opinion by Justice Story states: "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. . . ."

"The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

⁴⁸ *The Barnstable*, 181 U. S. 464, 21 Sup. Ct. 684 (1900), where the vessel was held liable *in rem* for negligence of a demise charterer. The vessel is not liable however for the acts of persons unlawfully in possession of her. *The C. E. Conrad*, 57 Fed. 256 (S. D. N. Y. 1893); *The Schooner Anne*, 1 Mason 508, Fed. Case No. 412 (1818). Under English law the ship is only liable *in rem* where its owners are liable *in personam*. *The Ripon City*, Prob. 226 (1897); *The Tervæte*, Prob. 259 (1922). In the United States the owners are not liable *in personam* for damages caused by a vessel due to the negligence of a compulsory pilot. *Homer Ramsdell Transp. Co. v. Compagnie Générale Transatlantique*, 182 U. S. 406, 21 Sup. Ct. 831 (1901). Consequently, it results that

the owner of a wharf damaged by a vessel due to the negligence of a compulsory pilot is remediless because the tort is nonmaritime, admiralty has no jurisdiction, and he cannot sue *in rem*; whereas the owner of another vessel damaged through the same negligence can sue *in rem*. This anomaly works manifest injustice and has led to various efforts of bar associations to obtain legislation by Congress giving jurisdiction to admiralty of collisions of ships with wharves, docks, and other commercial structures extending into the water, but thus far these efforts have proved unsuccessful. Such proposed legislation would seem to be within the implied powers of Congress to "alter, qualify or supplement" the admiralty jurisdiction and maritime law. *United States v. Flores*, 289 U. S. 137, 148, 53 Sup. Ct. 580, 582 (1932).

⁴⁹ 4 Wheat. (17 U. S.) 438 (1819).

⁵⁰ Act of June 23, 1910, 46 U. S. C. 971-975.

⁵¹ 21 Wall. (88 U. S.) 558, 572, 593 (1874).

⁵² The majority opinion by Justice Bradley reads: "The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States.

"But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country" (572). The dissenting opinion by Justice Clifford showed that Justice Story had been mistaken in his belief regarding the rule of the general maritime law, and had applied an exception of the English law in the *General Smith*, and concludes: "Taken as a whole the opinion in that case is more unsatisfactory than any one ever given in a commercial case by that learned judge. It is unaccountable, says a distinguished jurist, that Judge Story, in delivering the opinion of the court on a question so interesting and pregnant, should have done so little. He gives but one page to the entire opinion, cites no authorities, and treats the subject in a slight and unsatisfactory manner" (593). The courts refused to extend the doctrine of the *General Smith* beyond repairs and supplies, and held it inapplicable to salvage [*Chapman v. Engines of Greenpoint*, 38 Fed. 671 (S. D. N. Y. 1889)], to towage [*The John Cuttrel*, 9 Fed. 777 (E. D. N. Y. 1881)], to pilotage [*The Pirate*, 32 Fed. 486; *The Surprise*, 129 Fed. 873 (C. C. A. 1st., 1904)], to wharfage [*The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7622 (E. D. N. Y. 1871)], or to services of watchmen or working stevedores [*The Seguranc*, 58 Fed. 908 (S. D. N. Y. 1893)]. Judge Addison Brown in the opinion in *Chapman v. The Engines of Greenpoint*, *supra*, said: "That the rule as to repairs and supplies which early obtained a foothold in our maritime law was not suited to the general necessities of this country, is sufficiently attested by the fact that in nearly all the states liens upon domestic vessels have been provided by statute to supply the exceptional defects of our maritime law; and the admiralty courts recognize and enforce these liens."

⁵³ Among the cases showing the adoption of such equitable principles are *United States v. Cornell Steamboat Co.*, 202 U. S. 184, 194, 26 Sup. Ct. 648 (1905); *Higgins v. Anglo-Algerian S. S. Co. Ltd.*, 248 Fed. 386 (C. C. A. 2d, 1918); *Texas Co. v. Hogarth Shipping Co. Ltd.*, 265 Fed. 375 (S. D. N. Y. 1919), *aff'd*, 267 Fed. 1023 (C. C. A. 2d, 1920), *aff'd*, 256 U. S. 619; *The Stanley H. Miner*, 172 Fed. 486 (E. D. N. Y. 1909); *The Kalfarli*, 277 Fed. 391, 396 (C. C. A. 2d, 1921).

⁵⁴ 264 U. S. 219, 44 Sup. Ct. 302, 307 (1924). Justice Brandeis referred to the cases on this point as follows: "*See Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733 (1914); *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221, 222, 37 Sup. Ct. 524 (1916)."

⁵⁵ 253 U. S. 149, 40 Sup. Ct. 438 (1920).

⁵⁶ Art. 3, Par. 2

⁵⁷ *The Hamilton*, 207 U. S. 398-404, 28 Sup. Ct. 133 (1907) (opinion of Court by Justice Holmes): "The grant of admiralty jurisdiction, followed and construed by the judiciary act of 1789, 'saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it,' (Rev. Stats. § 563, Cl. 8), leaves open the common-law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. *Martin v. Hunter*, 1 Wheat. 304, 337; *The Hine v. Trevor*, 4 Wall. 555, 571; *Leon v. Galceran*, 11 Wall. 185; *Manchester v. Massachusetts*, 139 U. S. 240. And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the national courts, tends to establish the legislative power of the State where Congress has not acted." And see also *Southern Pacific v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524 (1916) (opinion of Court by Justice McReynolds): "In view of these constitutional provisions and the Federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute (*The Lottawanna*, 21 Wall. 558, 579, 580; *The J. E. Rumbell* 148 U. S. 1); pilotage fees fixed (*Cooley v. Board of Wardens*, 12 How. 299; *ex parte McNiel*, 13 Wall. 236, 242); and the right given to recover in death cases (*The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95, 138). . . . Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty (*The Moses Taylor*, 4 Wall. 411; *American Steamboat Co. v. Chase*, 16 Wall. 522, 534; *The Glide*, 167 U. S. 606); nor create liens for materials used in repairing a foreign ship (*The Roanoke*, 189 U. S. 185). See *Workman v. N. Y. City*, 179 U. S. 552."

⁵⁸ See cases cited in note 45, *supra*.

⁵⁹ 119 U. S. 199, 213, 7 Sup. Ct. 140 (1886).

⁶⁰ Among such cases discussed by the Court were: *Plummer v. Webb*, 1 Ware 75; *Cutting v. Seabury*, 1 Sprague 522; *The Sea Gull*, Chases Dec. 145, *The City of Brussels*, 6 Ben. 370; *The Towanda*, 34 Leg. Int. (Philadelphia) 394; *The David Reeves*, 5 Hughes 89; *The Manhasset* 18 Fed. 918; *The Columbia*, 27 Fed. 238 (Mass. 1886).

⁶¹ Among cases based on state statutes discussed by the Court were *Holmes v. Oregon* etc., Ry. 5 Fed. 75 (Ore. 1880); *Long Island etc., Co.*, 5 Fed. 599 (S. D. N. Y. 1881); *The Garland*, 5 Fed. 924 (E. D. Mich. 1881); *The Sylvan Glen*, 9 Fed. 333 (C. C. E. D. La. 1881); *E. B. Ward, Jr.*, 17 Fed. 456 (C. C. E. D. La. 1883), 23 Fed. 900.

⁶² *Insurance Co. v. Brame*, 95 U. S. 756 (1877).

⁶³ In such a suit in admiralty under the wrongful death act of a state libellant's contributory negligence is held to be a complete bar to recovery and the usual admiralty rule of divided damages is not applied. *Monongahela* etc., Co. v. Schinnerer, 196 Fed. 375 (C. C. A. 6th, 1912); *Gretschmann v. Fix*, 189 Fed. 716 (W. D. N. Y. 1911); *O'Brien v. Luckenbach*, 293 Fed. 170 (C. C. A. 2d, 1923); *Groonstad v. Robins*, 236 N. Y. 52, 139 N. E. 777 (1923), showing clearly that this is an act of adoption by admiralty and nothing more.

⁶⁴ 145 U. S. 333, 348, 12 Sup. Ct. 949 (1891).

⁶⁸ The Court cited the following cases: *The Sylvan Glen*, 9 Fed. 335 (E. D. N. Y. 1881); *The Manhasset*, 18 Fed. 918 (E. D. Va. 1884); *The North Cambria*, 40 Fed. 655 (E. D. Pa. 1889); *The Oregon*, 45 Fed. 62 (Ore. 1891). Since the *Corsair* decision, admiralty courts have sustained libels *in rem* where the state statute gave a lien. *The Anglo-Patagonian*, 235 Fde. 92, *cert. denied*, 242 U. S. 636; *The Aurora*, 163 Fed. 633 (Ore. 1908); *The Samnanger*, 298 Fed. 620 (S. D. Ga. 1924).

⁶⁹ 207 U. S. 398, 404, 28 Sup. Ct. 133 (1907).

⁷⁰ See note 57, *supra*, for this discussion.

⁷¹ 210 U. S. 95, 28 Sup. Ct. 664 (1907).

⁷² 257 U. S. 233, 42 Sup. Ct. 89 (1921).

⁷³ 261 U. S. 479, 43 Sup. Ct. 418 (1923).

⁷⁴ 244 U. S. 205, 216, 217, 37 Sup. Ct. 524 (1916).

⁷⁵ 215 N. Y. 514, 519, 109 N. E. 600 (1915).

⁷⁶ Although in the case under discussion the shipowner directly employed the individual longshoremen who loaded and discharged its cargoes, this is not the usual practice in the United States where local contracting stevedores obtain the work and hire the individual longshoremen. Practically, therefore, the Workmen's Compensation Act, if it had been held applicable to deaths or injuries to stevedores on navigable waters, would in fact have subjected local stevedoring companies and not foreign ships to the liability referred to, for the New York Act was based on the contract of employment theory and not upon tort. Such stevedoring companies were held subject to such liability where the death occurred in handling cargo upon dock [*State Industrial Commission v. Nordenholt Corporation*, 259 U. S. 263, 42 Sup. Ct. 473 (1922)] and compare the doctrine of the principal case with *Cooley v. Board of Wardens*, 12 How. (53 U. S.) 299 (1851), in which the Court upheld the right of the several states to create local pilot associations and require foreign ships to employ members of these associations when entering and leaving port.

⁷⁷ See p. 310 *supra* where Justice Holmes's remarks regarding uniformity in *The Hamilton* are quoted. It is difficult to see the reason for holding that "lack of uniformity" was immaterial in the cases involving state death statutes as applied to admiralty and so vitally material in the cases involving workmen's compensation acts. Possibly the reason for the distinction was that admiralty could itself give effect to the state death statutes while it lacked the machinery to enforce the provisions of the workmen's compensation acts.

⁷⁸ Approved Oct. 6, 1917—40 STAT. 395, c. 97.

⁷⁹ 253 U. S. 149, 40 Sup. Ct. 438 (1920).

⁸⁰ Act of June 10, 1922, 42 STAT. 634, 28 U. S. C. 41 (3).

⁸¹ 264 U. S. 219, 44 Sup. Ct. 302 (1924).

⁸² Longshoremen's and Harbor Workers' Compensation Act enacted March 4, 1927, c. 509; 44 STAT. 1424, 33 U. S. C. 901-950.

⁸³ *Northern Coal Co. v. Strand*, 278 U. S. 142, 49 Sup. Ct. 88 (1928); *Employers Co. v. Cook*, 281 U. S. 233, 50 Sup. Ct. 308 (1930), both stevedore cases, in which the Supreme Court reversed workmen's compensation awards, saying in the first case: "The unloading of a ship is not a matter of purely local concern." In *Baizley Iron Works v. Span*, 281 U. S. 222, 50 Sup. Ct. 306 (1930), the Court reversed a compensation award to an ironworker engaged in repairing a vessel, saying: "Repairing a completed ship lying in navigable waters has direct and intimate connection with navigation and com-

merce" and is not a matter of local concern. See also *Messel v. Foundation Co.*, 274 U. S. 427, 47 Sup. Ct. 695 (1927).

⁸¹ 257 U. S. 469, 42 Sup. Ct. 157 (1921).

⁸² In the following cases the Supreme Court has upheld state workmen's compensation awards on the ground that they involved matters of mere local concern: A diver who drowned in a navigable river while sawing off timbers in an abandoned ship way, *Millers Indemnity v. Braud*, 270 U. S. 59, 46 Sup. Ct. 194 (1926); a worker acting as combined seaman, fisherman, and cannery helper injured while pushing a boat off the shore to take it to dock, *Alaska Packers Assoc. v. Industrial Accident Commission*, 276 U. S. 467, 48 Sup. Ct. 346 (1928); a man injured in assembling logs in booms on a navigable river for towage elsewhere for sale, *Sultan Ry. v. Department of Labor*, 277 U. S. 135, 48 Sup. Ct. 505 (1928); a watchman whose life was lost while stationed on a floating fish trap, fastened to the shore off the Alaska coast, *Sunny Point Co. v. Faigh*, A. M. C. 600 (C. C. A. 9th, 1933). But in case of a sailor engaged in taking pleasure parties out on fishing excursions who was drowned while trying to rescue one of his employer's boats, which had grounded, an award of workmen's compensation was reversed on the ground that the case involved both a maritime contract and tort and was not a matter of local concern, *London v. Industrial Commission*, 279 U. S. 109, 49 Sup. Ct. 296 (1929).

⁸³ *The General Smith*, 4 Wheat. (17 U. S.) 438 (1819); *The Lottawanna*, 21 Wall. (88 U. S.) 558 (1874); *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498 (1893).

⁸⁴ *Cooley v. Board of Port Wardens*, 12 How. 299 (1852); *Ex parte McNeil* 13 Wall. 236 (1871).

⁸⁵ *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 44 Sup. Ct. 274 (1924).

⁸⁶ *Atlantic Fruit Co. v. Red Cross Line*, 276 Fed. 319 (S. D. N. Y. 1921), *aff'd* 5 F. (2d) 218 (C. C. A. 2d 1924). See also to the same effect, *Tatsuuma K. K. K. v. Prescott*, 4 F. (2d) 670 (C. C. A. 9th, 1925).

⁸⁷ See *Robins Dry Dock and Repair Co. v. Dahl*, 266 U. S. 449, 45 Sup. Ct. 157 (1925) (labor law providing for safety appliances as affecting vessels on navigable waters); *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 Sup. Ct. 112 (1919) (statute of frauds as affecting maritime contracts of employment); *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91 (1885) (code provision regarding damages); *Steamboat New York*, 18 How. (59 U. S.) 223 (1855) (law regarding lights on vessels); *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490, 43 Sup. Ct. 172 (1923) (statute creating lien on vessels navigating waters of state for nonperformance of affreightment contracts); *The Barque Chusan*, Fed. Cas. No. 2717 (1843) (statute providing that lien for supplies was lost on vessel leaving state waters); *Rodgers and Hagerty v. City of New York*, 285 Fed. 362 (C. C. A. 2d, 1932), *cert. denied*, 261 U. S. 621 (charter requiring claims to be audited before suit); *New Zealand Ins. Co. v. Earnmoor S. S. Co. Ltd.*, 79 Fed. 368 (C. C. A. 9th, 1897) (statute providing rate of interest on decree); *The Thielbek*, 241 Fed. 209 (C. C. A. 9th, 1917); *cert. denied*, 245 U. S. 661 (statute limiting municipality's liability for local towage service furnished by it).

⁸⁸ *The Lottawanna*, 21 Wall. (88 U. S.) 558, 577 (1874). See also *Butler v. Boston S. S. Co.*, 130 U. S. 527, 9 Sup. Ct. 612 (1889); *The Hamilton*, 207 U. S. 398, 404, 28 Sup. Ct. 133 (1907); *Panama R. R. Co. v. Johnson*, 264 U. S. 375 (1924); *United States v. Flores*, 289 U. S. 137, 149, 53 Sup. Ct. 580 (1932); *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 55 Sup. Ct. 31 (1933). In *United States v. Flores*, *supra*, the Court

said: "This section (Art. III, § 2) has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies, and, by implication, conferring on Congress the power, subject to well recognized limitations not here material, to alter, qualify, or supplement it as experience or changing conditions may require."

⁸⁹ *N. J. Steam Nav. Co. v. Merchant's Bank*, 47 U. S. (6 How.) 344 (1848).

⁹⁰ 20 Appendix, U. S. CONG. GLOBE, 331, 332.

⁹¹ *Id.* at 715, 738, 776.

⁹² Sprague, *Limitation of Ship Owners Liability* (1935) 12 N. Y. U. LAW QUARTERLY REV. 568 at 578: "While Sections 1, 2, 3, and 6 are substantially the same as the English law, Section 5 is copied from the Statutes of Massachusetts and Maine, while Section 4 is a composite of two sentences the first of which summarizes the English and Massachusetts rule of limitation, and the last, the French rule of abandonment. Section 4 is one of the most important sections of the Act and the effect of uniting English and French systems therein has been to make the American system of limitation a hybrid and far different from the English system which Congress apparently thought it was adopting."

⁹³ Sec. 1. Commonly known as the Fire Statute and is 46 U. S. C. 182. The "design or neglect" referred to is that of the shipowner as distinguished from that of the ship's officers and engineers, and the burden of proving such design or neglect is upon the cargo owner. *The Galileo*, 287 U. S. 420 (1932).

⁹⁴ Sec. 2. 46 U. S. C. 181.

⁹⁵ Sec. 3. *Id.* 183. This was clearly limited to tort liabilities. Amended Aug. 29, 1935, to provide that, for loss of life or personal injuries without fault or privity, the shipowner should be liable for not less than sixty dollars per ton of the vessel's gross tonnage.

⁹⁶ Sec. 4. *Id.* 184, 185.

⁹⁷ Sec. 5. *Id.* 186.

⁹⁸ Sec. 6. *Id.* 187.

⁹⁹ Act of June 26, 1884, c. 121, Par. 18, 23 STAT. 57. This section is now 46 U. S. C. 189. See *Richardson v. Harmon*, 222 U. S. 96, 103-106 (1911); *Capitol Transp. Co. v. Cambria Steel Co.*, 249 U. S. 333, 334, 336, 39 Sup. Ct. 292 (1919). But the shipowner is still liable without limitation for his "personal contracts," such as express or implied warranties of seaworthiness. *Pendleton v. Benner Line*, 246 U. S. 353, 38 Sup. Ct. 330 (1918); *Luckenbach v. McCahan*, 248 U. S. 139, 39 Sup. Ct. 53 (1918); *Cullen Fuel Co. v. Hedger Co.*, 290 U. S. 82, 88, 54 Sup. Ct. 10 (1933).

¹⁰⁰ Act of Aug. 29, 1935, c. 804, par. 1, 2, 49 STAT. 960—now included in 46 U. S. C. 183 and 183a. This act was an aftermath of the Morro Castle and Mohawk disasters in 1934 and 1935.

¹⁰¹ *Lord v. Steamship Co.*, 102 U. S. 541 (1880); *Providence and New York S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 598, 3 Sup. Ct. 379 (1883).

¹⁰² *Butler v. Boston S. S. Co.*, 130 U. S. 527, 556, 557, 9 Sup. Ct. 612 (1889); *In re Garnett*, 141 U. S. 1, 12, 11 Sup. Ct. 840 (1891).

¹⁰³ Art. III, § 2.

¹⁰⁴ *Butler v. Boston S. S. Co.*, 130 U. S. 527, 556-557, 9 Sup. Ct. 612 (1889).

¹⁰⁵ *The Scotland*, 105 U. S. 24 (1881); *The Titanic*, 233 U. S. 718, 34 Sup. Ct. 754 (1914).

¹⁰⁶ Act of Feb. 13, 1893, c. 105, 46 U. S. C. 190-195.

¹⁰⁷ *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516 (1896); *Knott v. Botany Mills*, 179 U. S. 69, 71, 21 Sup. Ct. 30, 31 (1898).

¹⁰⁸ Sec. 1.

¹⁰⁹ Sec. 2.

¹¹⁰ Sec. 3.

¹¹¹ Other sections made it the duty of the shipowner to issue bills of lading "which shall be prima facie evidence of the receipt of the merchandise therein described" (§ 4); provided a fine for failure to issue such a bill of lading (§ 5); provided that the Act did not repeal or modify other legislation (§ 6), and that it did not apply to the transportation of live animals (§ 7).

¹¹² The act, therefore, does not apply to voyages between foreign ports [*The Fri*, 154 Fed. 333 (C. C. A. 2d, 1907); 210 U. S. 431, 28 Sup. Ct. 761 (1908)]; while § 3 applies to coastwise or intercoastal voyages where both termini are American ports, § 1 and § 2 do not [*Knott v. Botany Mills*, 179 U. S. 69, 21 Sup. Ct. 30 (1898)]. The Act does not apply to a private carrier; e.g., to a charter of a ship for a whole cargo unless incorporated by reference—*The Lyra*, 253 Fed. 677 (C. C. A. 9th, 1919); *The Fri*, 154 Fed. 333 (C. C. A. 2d, 1907); *The G. R. Crowe*, 294 Fed. 506 (C. C. A. 2d, 1923), *cert. denied*, 264 U. S. 586, 44 Sup. Ct. 335 (1924).

¹¹³ See *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516 (1896) holding that § 3 does not affect the relations of one vessel to another, i.e., collisions; and, *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102 (1902), that it does not apply to passengers and their baggage. It is applicable to the relations between a tug and the cargo upon her tow—*Sacramento Co. v. Salz*, 273 U. S. 326, 47 Sup. Ct. 368 (1928).

¹¹⁴ *Contrast The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7 (1898) and *International Navigation Company v. Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591 (1901). See also *Knott v. Botany Mills*, 179 U. S. 69, 21 Sup. Ct. 30 (1898).

¹¹⁵ *LORD AND SPRAGUE, CASES ON ADMIRALTY* (1926) 278, n. 19.

¹¹⁶ *The Carib Prince*, 170 U. S. 653, 18 Sup. Ct. 753 (1898). See also *The Jason*, 225 U. S. 32, 32 Sup. Ct. 560 (1912) in which the so-called "Jason clause" was upheld, providing that the cargo owners shall participate in general average even though the "imminent peril" has been caused by the negligence of the ship's officers, if the owner has exercised due diligence to make the vessel seaworthy.

¹¹⁷ *The Jason*, 225 U. S. 32, 32 Sup. Ct. 560 (1912). In this case the court contrasted §§ 1 and 2 with § 3, saying: "The antithesis is worth noting. Congress says to the shipowner: 'In certain respects you shall not be relieved from the responsibilities incident to your public occupation as a common carrier, although the cargo owners agree that you shall be relieved; in certain other respects (provided you fulfill conditions specified) you shall be relieved from responsibility, even without a stipulation from the owners of cargo.'"

¹¹⁸ *Ralli v. N. Y. & T. S. S. Co.*, 154 Fed. 286 (C. C. A. 2d, 1907); *S. S. Wellesley Co. v. Hooper*, 185 Fed. 733 (C. C. A. 9th, 1911); *Gilchrist Transp. Co. v. Boston Ins. Co.*, 223 Fed. 716 (C. C. A. 6th, 1915).

¹¹⁹ *The Wildcroft*, 201 U. S. 378, 26 Sup. Ct. 467 (1906).

¹²⁰ *May v. Hamburg Amerikanische etc.*, 290 U. S. 333, 54 Sup. Ct. 162 (1933).

¹²¹ On April 16, 1936, the United States "Carriage of Goods by Sea Act" (Public, No. 521, 74th Congress) was approved, becoming effective July 15, 1936, and is, by its terms, written into all bills of lading between the United States and foreign ports. This

legislation is substantially an adoption of The Hague Rules of 1921 which were adopted by England as "Carriage of Goods by Sea Act," 1924. The adoption of this act is thought to limit the Harter Act to transactions before loading and after discharge of cargo (§ 12). Now 46 U. S. C. 1300-135.

¹²² Act of June 23, 1910, c. 373, 36 STAT. 604, 122 repealed and reenacted with slight changes as subsections P-T, inclusive, of § 30 of Act of June 5, 1920, c. 250, 41 STAT. 1005. Now appears as subdivision of SHIP MORTGAGE ACT under subtitle of "Maritime Liens for Necessaries," 46 U. S. C. 971-975 (1935), although it has only an indirect relation to ship mortgages.

¹²³ *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.* 254 U. S. 1, 41 Sup. Ct. 1, 4 (1920).

¹²⁴ Sec. 1.

¹²⁵ Sec. 2.

¹²⁶ Sec. 3.

¹²⁷ Sec. 4.

¹²⁸ Sec. 5. The repeal and reenactment of this act in connection with the Ship Mortgage Act modified § 1 by adding "towage" following "supplies," and § 4 by adding certain clauses regarding preferred mortgage liens, etc. See 46 U. S. C. 974.

¹²⁹ *The J. Doherty*, 207 Fed. 997 (S. D. N. Y. 1913); *The Hatteras*, 255 Fed. 518 (C. C. A. 2d, 1918); *The Yarmouth*, 262 Fed. 250 (C. C. A. 5th, 1920); *The Muskegon*, 275 Fed. 117 (S. D. N. Y. 1921), *aff'd*, 275 Fed. 348 (C. C. A. 2d, 1921).

¹³⁰ *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, 41 Sup. Ct. 1 (1920).

¹³¹ See *United States v. Carver*, 260 U. S. 482, 43 Sup. Ct. 181 (1923), in which the Court, after quoting § 3, said: "We regard these words as too plain for argument. They do not allow the material man to rest upon presumptions until he is put upon inquiry, they call upon him to inquire. To ascertain is to find out by investigation. If by investigation by reasonable diligence the material man could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if in the same way he could have found out its terms he was chargeable with notice of its terms. In this case it would seem that there would have been no difficulty in finding out both." See also *The South Coast*, 251 U. S. 519, 40 Sup. Ct. 233 (1920); *Morse Dry Dock etc. R. Co. v. United States*, 1 F. (2d) 233 (C. C. A. 2d, 1924), *cert. denied*, 266 U. S. 620; *The American Star*, 11 F. (2d) 479 (C. C. A. 3d, 1926); *United States v. Robins Dry Dock & Repair Co.*, 13 F. (2d) 808 (C. C. A. 1st, 1926).

¹³² Act of June 5, 1920, c. 250 Par. 30, subsections a-o, incl., 41 STAT. 1000-1004, 46 U. S. C. 911-961, *amended as to* § 922 by Act of June 27, 1935, c. 319, 49 STAT. 424.

¹³³ *The John Jay*, 17 How. (58 U. S.) 399 (1854); *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498 (1893).

¹³⁴ *Detroit Trust Co. v. Barlum S. S. Co.*, 293 U. S. 21, 55 Sup. Ct. 31 (1934).

¹³⁵ *The Oconee*, 280 Fed. 927 at 929 (E. D. Va. 1921) opinion by Judge Groner.

¹³⁶ Subsection K. (§ 951).

¹³⁷ Subsection N. (§ 953). Suit is also allowed against the mortgagor *in personam* in admiralty for the whole amount of the indebtedness or for any deficiency—Subsection N (46 U. S. C. 954).

¹³⁸ Subsection N.

¹³⁹ The only uninsurable items are "liens arising prior in time," concerning which the

mortgagor customarily protects himself by a bond or other security, and wages of the crew, as "wages of a stevedore when employed directly by the owner," etc., may be disregarded in the ordinary case because the individual stevedores (better known as longshoremen) are usually not employed directly by the shipowner but by a contracting stevedore. Crews' wages cannot get long in arrears without cessation of operation.

¹⁴⁰ 293 U. S. 21, 55 Sup. Ct. 31 (1934).

¹⁴¹ Act of June 5, 1920, c. 250, Par. 33, 41 STAT. 1007, 46 U. S. C. 688, amending Act of March 4, 1915, c. 153, Par. 20, 38 STAT. 1185. This section was included in the legislation entitled "An Act to provide for the promotion and maintenance of the American Merchant marine," etc., which also contained "The Ship Mortgage Act 1920" and reenacted the "Act Relating to liens on vessels for repairs, supplies or other necessities," *supra*.

¹⁴² The Osceola, 189 U. S. 158, 23 Sup. Ct. 483 (1902), Chelentis v. Luckenbach S. S. Co., 247 U. S. 373, 38 Sup. Ct. 501 (1918).

¹⁴³ 247 U. S. 372, 38 Sup. Ct. 501 (1918).

¹⁴⁴ Act of April 22, 1908, c. 149, 35 STAT. 65 as am'd; 45 U. S. C. Par. 51-59. This act abrogates the fellow servant rule. It also does away with the doctrine of assumption of risk where the employer has failed to comply with statutory requirements concerning safety devices. It provides for divided damages in the case of plaintiff's contributory negligence which is also the maritime rule [The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29 (1890)]. Suit brought under this Act must be commenced within two years and cannot be removed from a state court to the Federal court for diversity of citizenship. All these provisions are in effect written into the Jones Act.

¹⁴⁵ 264 U. S. 375, 44 Sup. Ct. 391 (1924). The Court in its opinion also stated: "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some nonmaritime system."

¹⁴⁶ 272 U. S. 50, 47 Sup. Ct. 19 (1926).

¹⁴⁷ Urvic v. Jarca Co., 282 U. S. 234, 51 Sup. Ct. 111 (1930).

¹⁴⁸ 33 U. S. C. 901-950.

¹⁴⁹ Lindgren v. United States, 281 U. S. 38, 50 Sup. Ct. 207 (1930).

¹⁵⁰ *Ibid*.

¹⁵¹ *In re East River Towing Co.*, 266 U. S. 355, 45 Sup. Ct. 114 (1924).

¹⁵² *Esteves v. Lykes Bros.* S. S. Co. 74 F. (2d) 364 (C. C. A. 5th, 1934), *cert. denied*, 295 U. S. 751; *Rudo v. A. H. Bull S. S. Co.*, 177 Atl. 538 (1935), *cert. denied*, 295 U. S. 759. In the first case the statute was held inapplicable to a seaman's claim for "injuries sustained while standing on dock painting the side of his ship." *Sed quare*.

¹⁵³ Act of Mar. 30, 1920, c. 111, Par. 1, 41 STAT. 537, 46 U. S. C. 761-768, originally entitled "An Act relating to the maintenance of actions for death on the high seas and other navigable waters."

¹⁵⁴ The Vestris 53 F. (2d) 847 (S. D. N. Y. 1931).

¹⁵⁵ Sec. 1.

¹⁵⁶ Sec. 2.

¹⁵⁷ Sec. 3.

¹⁵⁸ Sec. 6.

¹⁵⁹ Sec. 7.

¹⁶⁰ Sec. 5.

¹⁶¹ Sec. 4.

¹⁶² 281 U. S. 38, 50 Sup. Ct. 207 (1930).

¹⁶³ *The Windrush*, 286 Fed. 251 (S. D. N. Y. 1922). See also *Middleton v. Luckenbach S. S. Co.*, 70 F. (2d) 326 (C. C. A. 2d, 1934), *cert. denied*, 293 U. S. 577.

¹⁶⁴ See *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, 10 F. Supp. 677 (1935).

¹⁶⁵ *The Vestris*, 53 F. (2d) 847, cited note 154, *supra*.

¹⁶⁶ *The Windrush*, 286 Fed. 251 (1922). See also *Middleton v. Luckenbach S. S. Co.*, 70 F. (2d) 326 (1934), *cert. denied*, 293 U. S. 577, cited note 163, *supra*.

¹⁶⁷ See *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, 10 F. Supp. 677 (1935), cited note 164, *supra*.

¹⁶⁸ Act of March 4, 1927, c. 509, Par. 1, 44 STAT. 1424, 33 U. S. C. 901 *et seq.*

¹⁶⁹ *Panama R. R. Co. v. Johnson*, 264 U. S. 375 (1924). The Court also points out that there are other limitations "which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without."

¹⁷⁰ *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920); *State of Washington v. Dawson*, 264 U. S. 219 (1924). See discussion of these and other cases relating to state workmen's compensation acts under III, *supra*.

¹⁷¹ *Crowell v. Benson*, 285 U. S. 22, 39, 41, 52 Sup. Ct. 285 (1931). "As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction (Const. Art. 3, Par. 2, *Nogueira v. New York, N. H. & H. R. Co.*, 281 U. S. 128, 138) and the general authority of the Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute."

¹⁷² *Hunt v. Bank Line, Ltd.*, 35 F. (2d) 136 (C. C. A. 4th, 1929); *Sciortino v. Dimon S. S. Corp.*, 39 F. (2d) 210 (E. D. N. Y. 1930), *aff'd*, 44 F. (2d) 1019 (C. C. A. 2d, 1930); *Moore v. Christenson S. S. Co.*, 53 F. (2d) 299 (C. C. A. 5th, 1931).

¹⁷³ Act of Aug. 19, 1890, c. 102, 28 STAT. 672, 33 U. S. C. 61-141. And see historical note on p. 30 of 33 U. S. C.

¹⁷⁴ Act of Aug. 1, 1912, c. 268, 37 STAT. 242, 46 U. S. C. 727-731.

¹⁷⁵ Act of Mar. 9, 1920, c. 95, 41 STAT. 525, 46 U. S. C. 741-751. This act waives the sovereign immunity of the United States in cases of its ownership or possession of merchant vessels, tugboats, and cargoes, and permits suit *in personam* to be brought against it where, if said vessel or cargo had been privately owned or possessed, a proceeding in admiralty could have been maintained.

¹⁷⁶ Act of Mar. 3, 1925, c. 428, 43 STAT. 1112, 46 U. S. C. 782-790, which allows a "libel in personam in admiralty" to be brought against the United States for "damages caused by a public vessel" and for "towing and salvage services, including contract salvage rendered to a public vessel of the United States," subsequent to April 6, 1920.

¹⁷⁷ Act of Feb. 12, 1925, c. 213, 43 STAT. 886, 9 U. S. C. 1-15. This act provides machinery for arbitration in admiralty of disputes arising out of maritime transactions or contracts involving commerce, containing written agreements to arbitrate. Review of the award of arbitrators is by the district court in admiralty.

CONFLICTS OF LAWS IN THE HISTORY OF THE ENGLISH LAW

ALEXANDER N. SACK

SINCE the thirteenth century, jurists of continental Europe formulated the following two principles: first, that the (substantive) law of the forum shall not be the rule of decision in "foreign" cases;¹ second, that cases containing "foreign" and local elements may involve a "conflict" of laws and require, therefore, a "choice" of law to be applied to the given case.

Thus already Aldricus,² at the end of the twelfth century, clearly stated the problem of the conflict of laws and suggested the method for its solution.³

In the first quarter of the thirteenth century, Hugolinus,⁴ in his gloss to one of the laws of the Code of Justinian,⁵ commonly called "Cunctos Populos,"⁶ formulated the general principle that the emperor imposed law only on his subjects.⁷ Around 1250, Accursius,⁸ in his famous gloss⁹ to the same law of the Code, made a concrete application of this principle to the practical problems of the time and place, declaring that a Bolognese, going to Modena, should not be judged there according to the law of Modena, to which he is not subject.¹⁰ At the end of the thirteenth century a Frenchman, Petrus de Bellapertica, also clearly formulated the problem in question.¹¹

Conflicts of laws were intensively studied in Italy and in France in the course of centuries following the time of their origination,¹² and an important body of law on this subject had gradually grown up in these and other continental European countries. That doctrines on conflicts of laws originated and were developed in Italy and France was undoubtedly due to the fact of coexistence, in Italy, of the separate *statuta* of nu-

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merous quasi-independent municipal commonwealths, and, in France, of separate customary laws of different provinces of the kingdom, and to the resulting *intranational* (intercity, respectively interprovincial) conflicts of laws.

But *international* conflicts of laws also were well known to the French and Italian jurists in the thirteenth and fourteenth centuries. The "English question"¹³ had already been analyzed by Petrus de Bellapertica,¹⁴ Bartolus de Saxoferrato,¹⁵ and Bartholomaeus a Saliceto.¹⁶ Petrus de Bellapertica discussed also the conflict of English and French laws on the form of a will,¹⁷ while Guillelmus Durantis treated the conflict of Flemish and Genoese laws on the intrinsic validity of a will,¹⁸ etc.

"These topics were almost unknown in the English courts, prior to the time of Lord Hardwicke and Lord Mansfield."¹⁹ Blackstone²⁰ did not discuss conflicts of laws at all; the first work on the subject appeared in England in 1823.²¹ Burge published his *Commentaries on Colonial and Foreign Laws* in 1838.²² The treatise of Westlake appeared in 1858,²³ twenty-four years after Story's *Commentaries on the Conflict of Laws* was published.²⁴

Why was it so?

How did the English law on the conflict of laws originate?

I

1. The strong kingship, established in England after the Norman Conquest (1066), centralized the territorial and political organization of the country, and the king's courts arrogated to themselves a complete supremacy over local tribunals. The royal courts possessed and exercised an original jurisdiction coextensive with the realm and gradually evolved, out of the mass of local customs, a "common law" for the whole realm. By the twelfth century the law administered by the courts was a national "law of the land."²⁵

Thus at the time when Italy, France, and other continental

European countries possessed a multitude of varying local statutes and customs, England had an almost uniform law.

The result of this situation was that England almost did not know *intranational* conflicts of laws. There are in the books only a few cases in which such domestic conflicts appeared. In one case a freeman of London left the city and lived in the country for twenty years, where he later married and died. It was held that his wife should have her share in his personal estate according to the custom of London.²⁶ Using the terms of the Continental jurisprudence of the time, the custom of London was held to be a "statute personal," following the person of the decedent and ruling his personal property. On the other hand, the custom of York was held to be "local" ("real" in terms of the Continent), applicable only to property and effects within the province.²⁷ It was also held that the custom of London governed the entire estate (including the testamentary part thereof) of an intestate,²⁸ while the custom of York applied only to the customary part of such an estate.²⁹ In the case of an intestate who died within the province of York and who was also a freeman of the city of London, it was held that the custom of the city for the distribution of the personal estate should prevail and control the custom of the province of York, because the custom of York was only local, while that of London followed the person.³⁰

2. So far as *international* conflicts of laws are concerned, the situation, for many centuries, was characterized by the all-important fact that the common law did not take cognizance of foreign cases. Until the seventeenth century the rule was that such cases were not triable "at the common law."

As early as in 1280 it was held that the common-law courts had no jurisdiction to redress a tort committed abroad.³¹ In 1305, in a *monstravit de compoto* by law merchant, the plaintiff counted that the defendant was receiver of his monies in London, Dublin,

and Cork. It was held that the defendant should not answer for the receipts in Ireland.³² In 1308, in a case of a writ of debt upon a document executed at Berwick in Scotland, "because it was made at Berwick, where this court has not cognizance, it was awarded that John took nothing by his writ."³³ In 1369, the Court of the King's Bench held that it could not determine the case of a petition against the governor of the islands of Jersey, etc., for oppressions and wrongs done there.³⁴ In the course of the same century the common-law courts were refusing to take jurisdiction of contracts made,³⁵ and of other obligations incurred,³⁶ out of England. At the end of the fourteenth century a shipowner was without remedy at common law for breach of a charter-party made abroad.³⁷ As late as 1539, the common-law courts had no jurisdiction in such cases, for in that year a bill to enable them to try contracts made beyond the sea was rejected by the House of Lords.³⁸

3. The situation described above was due to the special features of the system of administration of justice, that prevailed in England during the period in question.

"By ancient constitution of the country, in that respect still remaining unchanged, the whole administration of civil and criminal justice depended upon the jury system."³⁹

"The method of trial by jury . . . is justly esteemed one of the chief excellencies of our Constitution, it being an institution most admirably calculated for the preservation of liberty, life, and property: indeed, what greater security can we have for these inestimable blessings, than the certainty that we cannot be divested without the unanimous decision of twelve of our honest and impartial neighbours?"⁴⁰

Trial by jury was trial *per pais*, that is by the "country," which meant (in the ancient language of the law) the county. A party was said to put himself upon the country; that is, upon the men

of the county. The jurors were local men cognizant, by their own knowledge, of the matter in dispute,⁴² and were to be summoned from the particular neighborhood, vicinage (*vicinetum*, visne), where the facts happened.⁴³ The pleadings were required to show this place, to "lay the venue,"⁴³ because, in executing the writ of *venire facias*, the sheriff had to know from what neighborhood the jurors should be summoned. Thus the rule became established that a jury could not inquire into any matter that did not take place within the given locality.⁴⁴

A statute of 1383⁴⁵ "to the intent that debt and account, and all other such actions might be brought in the same county where the contract was made," provided that the writ shall abate if by the declaration it appears that the contract was in a county other than that where the writ was brought. A statute of 1403⁴⁶ directed all attorneys to be sworn that they would make no suit in a foreign county. These statutes were strictly enforced by the courts.⁴⁷ As late as at the end of the fifteenth century, Littleton took it for granted that a thing done out of the realm could not be tried within the realm by the oath of twelve men.⁴⁸

4. Attempts to try foreign cases at common law were made. As early as 1375⁴⁹ an action was brought on a deed made at Harfleur in Normandy, and the plaintiff alleged in his claim that it was made at Harfleur *in the county of Kent*. The efficacy of such an allegation was, however, not decided upon, as the case went off upon another point.⁵⁰ Similar fictitious allegations seem to have been made in a few other cases during the fifteenth century,⁵¹ but they did not make new law or change the established rule.

Some modifications of the strict old rule were, however, unavoidable. Accordingly, death abroad was inquired of by the jury when this was necessary for the decision of cases concerning matters within the realm.⁵² In other cases, it was necessary to

ascertain whether a given person was born in England, or abroad ("out of the legiance"). In some of such older cases the issue was sent to be tried where the party claimed to have been born.⁵³ In later times, according to Coke, the rule was adopted that the place should not be material, and that the jury might find, upon evidence, birth of a man without the realm.⁵⁴

Again, in 1350 a statute⁵⁵ declared it to be treason by the common law to adhere to the enemies of the king within or without the realm, and a statute of 1541⁵⁶ provided that treason should be tried before a jury though the overt acts might have taken place beyond the realm.⁵⁷ But, of course, this was an exceptional case, because treason against England could be punished only by the English law, and trial by jury was necessary to safeguard the rights of the accused. It was only in the nineteenth century that some other extraterritorial crimes, if committed by British subjects abroad, were made punishable by the English law.⁵⁸

Then, also, the exercise of criminal jurisdiction of the admiralty was transferred, in 1536,⁵⁹ to commissioners of oyer and terminer, the trial to be "after the common course of the lawes of this lande," and a statute of 1540⁶⁰ provided for trial by jury of all criminal cases in admiralty, though such cases took place on the high seas and not within the body of an English county. This again was done for the protection of the accused, and the substantive-law jurisdiction of the admiralty in case of crimes committed without the body of an English county continued to remain separate and distinct from that of the common law.⁶¹

Only in 1605 was the rule expressly declared that a jury may find, in a private-law case, a foreign fact. In the *Dowdale* case⁶²—action of debt against executor who pleaded *plene administravit*, issue upon assets—the jury found that he had assets in Ireland, and "all the court, except Walmsley, held that it was well found, for they may find a thing in Ireland, and when they find that he

had assets, that is sufficient, and when they further say, in Ireland, it is idle and void, it was therefore adjudged for the plaintiff."⁶³

"For if the executors have goods of the testator's in any part of the world they shall be charged in respect of them, for many merchants and other men, who have stocks and goods to a great value beyond sea, are indebted here in England, and God forbid, that these goods should not be liable to their debts, for otherwise there would be a great defect in the law,"⁶⁴ "a failure of justice."⁶⁵

By 1605 the wealth of the nation was represented, to a great extent, by different kinds of personal property, not only in England, but also beyond the sea, and modification of the ancient rule became necessary. However, in the preceding centuries the social and economic regime of England was based on land-holding, agriculture, and other occupations of a local character, and the old rule appears to have been well suited to the conditions of that time.

There were also a few other cases in which trial was allowed of causes that arose without the given county. In a case of 1372, where a contract was made in a county palatine, it was held that the jury might be summoned from the neighboring English county.⁶⁶ A similar rule seems to have been adopted by the prothonotaries in 1454.⁶⁷ In 1441 it was held that a thing done in Wales could be tried at common law in the adjoining English county.⁶⁸ A statute of 1535 permitted trial of murders and felonies in Wales to be brought in the next English county.⁶⁹ In 1545, a question of fact happening in Ireland was tried in an English county, "next" to Ireland, and the *venire* was held to be well awarded.⁷⁰ In 1599—debt upon obligation to pay in Berwick, issue on payment—*visne* was awarded to the "next vill," and trial was at Belfort (being the "next vill" to Berwick), where the action was laid.⁷¹

These were, however, again cases of a special character. The localities in question were within the jurisdiction of the kingdom⁷² and subject to the law of England.⁷³ But the king's writs did not "run" there,⁷⁴ and, therefore, the writ of *venire facias* had to be sent to the sheriff of the next English county.⁷⁵ This practice⁷⁶ was *not* considered applicable to causes arising in foreign countries.⁷⁷

II

There were also some local cases in England which were not cognizable by the common law.

1. One group of these cases consisted of *complaints of alien merchants* concerning some local matter.

Originally, aliens were not deemed to be under the protection of the common law. Littleton said that they could bring no action, whether personal or real.⁷⁸ But foreign merchants were coming to England by license, or upon invitation, of the king. They were under his protection.

It was the king who administered justice to foreign merchants. Thus in the time of Edward II, a foreign merchant, Simon Dederit of Guynes, appealed to the *dominus rex* at Westminster in a case from the great fair at Saint Ives (in Huntingdonshire). Sheriffs of London, Lincoln, Winchester, and Northampton were ordered to produce before the king twelve good and lawful merchants to recognize, etc.⁷⁹ In 1338 several merchants of Spain, Portugal, Catalonia, and of other lands tearfully represented to the king that their merchandises, brought within the realm, had been taken away from them and detained without satisfaction. The king appointed three justices to hear the complaints of these merchants.⁸⁰

The king administered justice to foreign merchants in such causes according to the "universal law merchant." Thus already

in 1291 a writ to the sheriff of Gloucester directed him, in case of robbery to merchants ashore, to levy on the goods of the hundred to the amount of the loss, which was to be proved *secundum legem mercatoriam*.⁸¹ In the case of Dederit, mentioned above,⁸² the question was one of mercantile law.⁸³ In 1353 there was enacted a statute by which foreign merchants despoiled of their goods at sea were to have them restored without suit at common law and by employing mercantile proofs.⁸⁴ A statute of 1453 gave the chancellor, assisted by a judge, the right to hear cases of spoil by Englishmen or foreigners, to deal with the receiver of spoiled goods, and to make restitution of such ships and goods.⁸⁵ In the famous case⁸⁶ of "breaking the bulk"⁸⁷ by the carrier (1474), a merchant stranger had come to England on a safe conduct and his goods had been stolen at Southampton. He complained before the chancellor and the judges in the Star Chamber. The chancellor declared that the king had jurisdiction over the plaintiff and that the plaintiff was not bound to sue according to the law of the land with a trial by twelve men but was entitled to sue here according to the law of nature—that is, the law merchant, the universal law of the world.⁸⁸

Complaints of foreign merchants were heard by the chancellor,⁸⁹ or the Star Chamber,⁹⁰ or the king's council⁹¹—sometimes even by the common-law courts.⁹² But these cases were decided according to the "universal law,"⁹³ and when jury trial was resorted to, the jurymen, depending upon circumstances of the case, were chosen from among merchants, and sometimes from among foreign merchants.⁹⁴

2. The other group of cases in question was that of *local mercantile cases determinable by special commercial courts*.⁹⁵

The *Carta Mercatoria* of 1303⁹⁶ promised to foreign merchants from certain European countries speedy justice *secundum legem mercatoriam* from the officials "ferriarum, civitatum, burgorum

et villarum mercatoriarium." In all pleas, except those of a capital nature, half the jury was to consist of foreign merchants.

In 1353, the Statute of the Staple,⁹⁷ "to give courage to merchant strangers to come with their wares and merchandise into the realm,"⁹⁸ provided that in each of the staple towns a special court of the staple should function and hear all manner of pleas, with the exception of cases of felony or freehold, which remained subject to the jurisdiction of the king's courts. The staple court had to consist of a mayor and two constables, to be chosen annually by the commonalty of the merchants, aliens and denizens. They were to be assisted by two alien merchants, in case the complaining party was an alien merchant. The jury was to consist wholly of denizens, or wholly of aliens, or half denizens and half aliens, depending upon whether both parties were denizens, respectively aliens, or one party was a subject and the other a foreigner.

There were also pie-powder courts,⁹⁹ held by the mayor of a corporate town, and sometimes belonging to a lord. They were held at the time of a fair; right to hold a fair meant right to hold a court of pie-powder for the fair.¹⁰⁰ These courts had cognizance of all civil cases (except those concerning land),¹⁰¹ and of some cases of criminal and police character.¹⁰²

Both the staple courts¹⁰³ and the pie-powder courts¹⁰⁴ were administering the law merchant. But their jurisdiction was limited. The staple courts were dealing only with things touching the staple.¹⁰⁵ The pie-powder courts originally were entertaining cases arising outside the limits of the fair or at a previous fair,¹⁰⁶ but in 1477 it was enacted that they should take jurisdiction only of cases arising during the time,¹⁰⁷ and within the jurisdiction and bounds, of the fair.

Early insurance disputes seem to have been settled by conventional merchant courts or arbitrators, appointed, upon petition, by the Privy Council, the lord mayor of London, or the court

of admiralty.¹⁰⁸ In 1601 the first insurance act was passed,¹⁰⁹ empowering the lord chancellor or the lord keeper of the great seal to issue commissions, directed to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight "grave and discreet" merchants, to hear and determine in a summary manner insurance causes. This court of insurance commissioners had jurisdiction only of causes arising on policies issued in London.¹¹⁰

3. So far as *complaints of English subjects* were concerned, on account of *causes arising abroad*, the situation was as follows. It was recognized that in such cases English subjects should seek justice in the courts of the country where these causes arose. But if justice should be denied them there, then and only then the English sovereignty would lend them assistance. This consisted in the grant to them of remedies of an extraordinary, extrajudicial character.

These remedies were, first, letters of reprisal against subjects of the foreign State by whom the claimant had been wronged or "spoiled."¹¹¹ The granting of such letters lay within the jurisdiction of the chancellor, who required proof of the amount and cause of the claim, of unlawful acts which gave rise to it, and of failure to secure compensation by judicial or diplomatic means.¹¹² The granting of such letters was not considered an act of war,¹¹³ these letters being treated as "soe many temporarie dispensations agreeable to the Law of Nations and necessarily afforded from his Majestie for a supplie of that justice, which hath been wanting"¹¹⁴ in the foreign State in question. As a rule, seizures were authorized only on the high seas.

The other kind of relief consisted of the arrest of foreign merchants and their goods in England and keeping them under arrest until they had satisfied the party for the damages sustained by him in their country.¹¹⁵ Such measures again were taken only

in case the injured party could not obtain justice where he was deprived of his goods.¹¹⁶

Merchants from several foreign countries were granted, by special charters, immunity from distraint as pledgees for others.¹¹⁷ Furthermore, these remedies appear not to have been available for the purpose of collecting ordinary commercial debts incurred beyond the sea by a merchant stranger to an English merchant.¹¹⁸

In a few cases special commissions were issued to justices to try cases arising without the realm, but these were exceptional cases and the trial of them was "by the Law Merchant."¹¹⁹

4. There was also the prerogative *court of the lord constable and marshall*, commonly called "the court of chivalry."¹²⁰ It had cognizance of contracts and deeds of arms and of war out of the realm, and also of things within the realm, that touched war.¹²¹ But it had no jurisdiction over any other contracts or deeds.¹²² It administered the "Roman civil law."¹²³

5. Under the circumstances described above, it was only natural that the *admiralty* gradually extended its jurisdiction to all foreign causes that needed judicial protection and enforcement in England.

It was said that already an ordinance of Edward I at Hastings (1273) declared that contracts between merchant and merchant, or merchant and mariner, beyond sea or within the floodmark, should be tried before the admiral and not elsewhere,¹²⁴ and prohibited the suing of merchants, mariners, and other persons at the common law for anything appertaining to the marine law of ancient right.¹²⁵ The admirals took to exercising judicial powers, however, only sometime in the middle of the fourteenth century.¹²⁶ It was in 1360 that the letters patent creating an admiral began specifically to empower him to hold pleas and to punish offenders.¹²⁷ By the "Rules or Orders about Matters belonging to the Admiralty," which date from 1360 to 1369, the

admiralty claimed jurisdiction over charter-parties, obligations, and contracts made abroad or on the high seas.¹²⁹⁸

A statute of 1389 expressly prohibited the admirals from meddling with "anything done within the realm, but only of a thing done upon the sea,"¹²⁹⁹ and a statute of 1391 enjoined them to take cognizance of "contracts, pleas and quarrels, and all other things rising within the bodies of the counties."¹³⁰⁰ A statute of 1400¹³⁰¹ gave an action on the case for double damages to one who was sued in admiralty contrary to the statute of 1389.

Early in the fifteenth century a single lord high admiral of England was appointed, who established a central prerogative court of marine jurisdiction at London.¹³⁰² The business of the admiral in civil cases appears not to have been considerable during the fifteenth century.¹³⁰³

At the beginning of the sixteenth century started the gradual transformation of England from a kingdom whose social and economic life was based on landholding into a mercantile and maritime power. Foreign merchants were, gradually, deprived of their special privileges, and foreign trade began to pass into the hands of English merchants.¹³⁰⁴ The Tudors (from Henry VII, 1485, on) succeeded in strengthening their system of government by the Crown, and enhanced the powers of all the prerogative courts, including that of the admiralty.

The patents of the first half of the sixteenth century gave to the admiral extensive jurisdiction. Thus the patent appointing Prince Henry (Duke of Richmond) lord high admiral (1525) granted to him the power of "hearing and terminating plaints of all contracts . . . [of maritime contracts, and] . . . of all and singular contracts to be performed beyond sea, or contracted beyond sea . . ."¹³⁰⁵ (Italics supplied.) The later patents were in equally large terms.¹³⁰⁶

While this extension of the jurisdiction of the admiralty had

been called in question, in so far as cases that related to things done within the body of an English county¹³⁷ were concerned, contracts and other matters arising out of the realm, *in partibus transmarinis*, appear, during the first half of the sixteenth century, to have been recognized by the common-law courts as cognizable in admiralty.¹³⁸

A statute, enacted in 1540,¹³⁹ expressly gave to the admiralty jurisdiction to try summarily not only all matters relating to shipping and cargo, but also bills of exchange and other contracts made abroad.

The admiralty court became one of the great tribunals of England: "All contracts made abroad, bills of exchange [which at this period were for the most part drawn or payable abroad], commercial agencies abroad . . . [and] every kind of shipping business was dealt with by the Admiralty Court."¹⁴⁰ "Even marriage contracts and wills made abroad are occasionally met with as the subject of suits in Admiralty."¹⁴¹

The law which the admiralty administered was the "general" law of nations, the law maritime, and, particularly in cases of bills of exchange, bills of lading, and charter parties, the law merchant.¹⁴² Appeals from the admiralty lay to the king in chancery.¹⁴³ The king on each occasion appointed *judices delegati*.¹⁴⁴ In the Tudor period these delegates were civilians.¹⁴⁵

In the reign of Elizabeth (1558-1603), because of the commercial and maritime expansion of England, the wealth of the nation began to be represented more and more by the growing amount of different kinds of personal property. The common-law courts were still primarily concerned with real estate and other local problems. The increased business of the admiralty court was connected with the now developed shipping and foreign trade. The professional jealousy of the practitioners of the common law arose, and the common-law courts at Westminster

began to claim jurisdiction over cases which for a long period of time had been determined by the admiralty.¹⁴⁶

Nevertheless, jurisdiction of the admiralty over contracts and other things done upon the sea, as well as on land beyond the sea,¹⁴⁷ appears to have still been recognized. An agreement is said to have been made in 1575 between the common-law and the admiralty judges regarding the limits of their respective jurisdictions, which confirmed to the admiralty "cognition of all contracts and other things, rising as well beyond as upon the sea."¹⁴⁸ In a case, however, decided in the King's Bench in 1588,¹⁴⁹ it was declared that the jurisdiction of the admiralty over things done upon land in foreign parts was only concurrent with that of the common law.¹⁵⁰

III

As the result of the developments analyzed in the preceding sections, the English legal and judicial system of the sixteenth century became based on the following principles: *plurality* of the legal and judicial system—coexistence of different bodies of law and of different kinds of courts, one group separate and independent from another; *exclusiveness* of each of these parts of the system—each law had exclusive jurisdiction over certain kinds of cases, and courts of each of these parts administered exclusively their own law.

The result of this situation was as follows:

There were no conflicts of laws, so far as the question of eventual application by the given court of a "foreign" law was concerned. The substantive law of the forum was the rule of decision in all cases determinable by that forum. If a given case was not subject to the law administered by the given court, that court would (or should) not take jurisdiction of such a case.¹⁵¹ If a given case, however, was ruled by the law which the given court

was administering, this case should be determined by that court to the exclusion of any court that was administering another law.¹⁵²

There were, however, *conflicts of jurisdictions*, questions whether a given matter was triable at the common law, or by the admiralty, etc. "Jurisdiction," in these conflicts, meant always both judicial and legislative (substantive-law) jurisdiction.¹⁵³ Depending on whether a given case was triable at the common law or in some other court, that case had to be ruled by the one or the other law. On the other hand, depending on whether a case was to be ruled by the one or the other law, it had to be tried here or there.¹⁵⁴

During the period surveyed in the preceding sections, the conflicts of jurisdiction between the common law and the admiralty related almost exclusively to cases arising within the body of an English county. So far as foreign cases are concerned, the common-law courts, until the second half of the sixteenth century, did not claim jurisdiction over them.

In the meantime the rules of trial at common law had been gradually undergoing substantial changes. The jury began to decide questions not only upon its own knowledge but also upon deposition of witnesses.¹⁵⁵ Nevertheless, witnesses were still voluntary, and would not be compelled by the court to testify.¹⁵⁶ In 1562¹⁵⁷ a statute was passed, which imposed a penalty and granted a civil action against any person who refused to attend after service of process and tender of expenses. By the end of the sixteenth century the ordinary witness became the chief source of the jury's information. Members of the jury no longer were being summoned as witnesses. They became judges to receive facts from testimony of persons judicially examined before them.¹⁵⁸ This evolution was accompanied by a gradual modification of the ancient principle of locality of all actions.

An action may be founded on more than one thing, done

or existing, each of them, in a different county. The courts had faced such difficulties in previous times.¹⁵⁹ The "masculine sense"¹⁶⁰ prevailed, and the *Bulwer* case, decided in 1586,¹⁶¹ laid down the rule that, in such a case, if both things are material or traversable, and the one without the other does not maintain the action, the plaintiff may bring his action in either of the two counties.¹⁶²

This case concerned, however, local, "intercounty" matters. Now, what about "intercountry" matters, so called "mixed" (foreign-English) cases, in which "matters arising in a foreign country mix themselves with transactions arising here, or . . . become incidents in an action, the cause of which arises here . . ."¹⁶³

1. It has been shown, in Section I, that the old strict rule of trying only local facts and none other was, by necessity, relaxed, in some cases, already in the fourteenth century. It was becoming more and more clear that the old rule could not be applied in certain cases.

By 1375 it had been declared that if a contract were made in England, though it was to be performed abroad, it could be tried at common law.¹⁶⁴

In a case of 1492 it was said by the judges that in divers cases the jurors shall take cognizance of an act done in another country, as of shipping merchandise to Venice, or of freighting a foreign ship to Bordeaux against the statute, and of an alien born beyond sea; those things shall be tried in England; and a foreign county shall try damages in another county; and the jurors of one county shall find the making of a grant of a rent charge in one county, out of the lands of another county; and a lease and release made in a foreign county shall be tried in the county where the land lies; and a retainer of services beyond sea shall be tried in England.¹⁶⁵

In 1495, in an action upon a bond made in England and conditioned upon the sailing of a certain ship to Norway and then returning to London, the question arose if a jury in England could try whether or not the ship had been in Norway,¹⁶⁶ and it was said that "if the thing be all to be done beyond the sea, then it cannot be tried here, but if part be to be done here, and part beyond the sea, so as it is mixed, it may be tried here."¹⁶⁷ A similar statement is reported to have been made in a case of 1505.¹⁶⁸

But a definite change in the law came only after the leading case of *Bulwer* (1586), mentioned above, expressly sanctioned the rule that a case touching matters in more than one English county may be sued upon in any of such counties. It was then natural to make the next step and adopt the rule that a "mixed" case, involving matters in England and abroad, may be sued in England—in the county where the English part of the matter took place.

In the same year (1586), in a case of a charter-party made in England, where the question was whether or not the defendant performed the contract in Spain, the action was tried by a jury *de vicineto de* Thetford in Norfolk where the charter-party was made. The King's Bench, "after long deliberation," gave judgment for the plaintiff.¹⁶⁹ A similar question, whether or not a jury can take notice of things done *ultra mare*, came up in another case, in 1587.¹⁷⁰ In 1589, in an action on the case on assumpsit upon a policy of insurance made in London, the ship was arrested in France. The parties having come to issue whether the ship was so arrested or not, the issue was tried in London and found for the plaintiff. It was moved in arrest of judgment that this issue, arising from a place out of the realm, could not be tried, or, if it could, the jury should come from the place in England from which the ship sailed, "for they may have best knowledge of the arrest." It was held the trial was properly had in London, be-

cause "the ground and foundation of the action is the promise made in London, and the arrest which is in issue is not the ground of the action, but the assumpsit, and therefore in this case of necessity it shall be tried where the assumpsit was made."¹⁷¹

The three cases above do not appear to have involved any question of a conflict with a foreign law. In all of them the contracts were made in England, and in all of them the foreign matters appear to have raised only questions of fact. The only question was whether common-law courts had jurisdiction over these cases. Once it was decided that a jury could take cognizance of things done abroad, the answer was certain.

2. Some other cases involved a *conflict of jurisdictions*: of the common-law courts and of the admiralty.

In a case of 1604¹⁷²—of a contract made in London to transport in Turkey certain commodities, suit for nonperformance of the contract—it was held that the admiralty has no jurisdiction, "pur ceo que le contract fuit icy, & riens fait sur le mere."

In another case, decided in 1614, of a charter-party made in England, *infra portum de Lynn*, for a voyage into Denmark, the ship upon the seas sprang a leak, and freight was damaged. It was adjudged that the trial should be where the contract was made. "Where the original act was in England, and the subsequent matter upon the sea, the trial shall be where the original act is done."¹⁷³

In a case of 1625,¹⁷⁴ of a charter-party made in England, where nothing was to be done in England but only on the sea, it was held that the admiralty has no jurisdiction, "car le contract est l'original sans que nul cause de suit poet estre, & cest contract est hors de leur jurisdiction; & lou parte est triable al commun ley, parte per l'Admiral ley, le commun ley serra prefere."

Thus, in these three cases the conflict of jurisdictions, between the admiralty and the common law, was decided in favor of the common law. In all of these cases contracts were made on land in England and, therefore, the common law could claim substantive-law jurisdiction over them. In the first case nothing was done on the sea, and hence no matter, even of a purely factual character, took place in a locality within the jurisdiction of the admiralty. In the second case, the admiralty matter (leakage on the sea) appears to be of a purely factual character, not involving any question of law. And in the last case, where perhaps the admiralty part of the matter involved not only questions of fact, but also of law, the broad rule, which had been asserted some time before, by Coke,⁷⁷⁵ was laid down that if part is triable at the common law and part in the admiralty, the common law will be preferred.

In a case decided in 1627, of a charter-party made at Dunkirk "but to be performed in England" ("the freight being to be paid in London"), it was admitted by the defendant that it was triable at common law.⁷⁷⁶

3. Such "mixed" cases *may* involve questions of *foreign law*! And in some of such "mixed" cases the local matters (in England) *may* involve *only questions of fact*! Would the common-law courts take jurisdiction of such cases? and if so, would they apply to such cases the substantive *lex fori* (the common law of England) or the foreign law involved?

As will be shown in Sections VI and VII, it took more than a century for the common-law courts to give a definite answer to these questions.

In this connection a case decided in 1576 is most instructive.⁷⁷⁷ In this case the rule was laid down that if a contract is made in England, to carry goods to "Burdeaux" in France, to sell them

there, and to buy on the proceeds other goods there and bring these goods to England, then, if conversion takes place in England, this is triable at common law, and if property or money is converted in France, the plaintiff may elect to sue at common law or in the admiralty. But if a merchant in England writes to his factor in France to receive merchandise which he sent him and to sell it there, and factor receives and converts it, he shall be sued in the admiralty.²⁷⁸

Thus if *locus celebrationis contractus* and *locus delicti commissi* are in England, the case is triable only at common law. Why so? Is it not because such a case would involve only questions of the English common law? If neither of the two *loci* is in England, the case is triable only in admiralty. Why? Is it not because such a case would not involve questions of the English common law? If *locus contractus* is in England, while conversion takes place abroad, plaintiff may sue either at common law or in admiralty. Why? Again, is it not because suit, in such a case, may be based either on the English contract, that is, on the common law, or on the foreign tort, that is, on a law other than the common law?

In accordance with the old principle of exclusive administration by courts of their own substantive law, the rule of 1576 treated and solved the conflict of laws question as one involving a conflict of jurisdictions: Cases which shall, or may be, determined by the common law are triable in the common-law courts; other cases will be tried elsewhere.

4. Some "mixed" cases did involve a *conflict between the law of some foreign country and the English law*. In such cases the solution of the conflict was easy: Once some matter took place in an English county and involved a question of the common law, the case would be triable at the common law, though some other matters took place abroad and involved questions of (for-

eign!) law. The common law would be given "preference," and no problem would arise, in such cases, of the common-law courts' taking cognizance of, and applying, any foreign law!

Thus in *Don Alonso v. Cornero*, decided in 1612,¹⁷⁹ certain property was confiscated in Spain but brought by the former owner to England and sold in an open market. Afterwards the goods were attached by admiralty process, but prohibition to the admiralty was granted, "for the property of goods here at land must be tried at the Common Law."

This was a case of conflicting rights on property, one being acquired while the *res* was in Spain, the other by a purchaser after the *res* was brought to England. The locus of the purchase and of the *res* (at the time of such purchase and later on) being that of the English forum, the legal effect, if any, that the English law would give to such a purchase of a *res* in England would, of course, be decisive in the English courts. Under English law, sale in an open market vested property in the bona fide purchaser for value. Hence the Spanish government's title to the *res*, created by Spanish law, was, in England, destroyed by such sale. Such would have been the modern formulation of the rule of decision in this case. The line of reasoning in the case above was, however, of a different character, and consisted in the following propositions: The *res* is on land in England; hence the case is triable by the common-law courts; hence the common law is applicable; hence the title is in the purchaser. The conflict considered and solved by the court, in this case, was, therefore, not one between the Spanish law and the English law, but one between the jurisdiction of the admiralty court and that of the common-law court.

In 1599, in a case of goods taken piratically out of a ship and afterwards sold on land, it was held that suit may be in the admiralty, and prohibition to the admiralty was denied, "unless the sale had been in a market overt," "for although the Court of

Admiralty hath no authority to meddle with things upon the land, yet when the original cause ariseth upon the sea, and other matters happen upon the land, depending upon the original cause, these matters, although done upon the land, shall be tried in the Admiral's Court. . . .¹⁸⁰ A substantially similar case was decided in a similar way in 1672.¹⁸¹

From the point of view of the conflict of jurisdictions (admiralty versus common-law courts) the case of 1612, on the one hand, and those of 1599 and 1672, on the other hand, would seem not to be in harmony: the case of 1612 held that the common-law courts had jurisdiction because the property was on land in England, while the cases of 1599 and 1672 held, in a similar situation, that the common law did *not* have jurisdiction.

But from the point of view of the conflict of laws all three cases above can be reconciled. The common law does give valid title to a bona fide purchaser on a market overt; the law administered in admiralty does not.¹⁸² Neither the common law nor the law of the admiralty would give to a purchaser valid title to stolen and otherwise unlawfully obtained goods purchased by him not on a market overt. In the 1612 case the purchase was on a market overt; in the cases of 1599 and 1672 it was not. In the 1612 case the question of application *vel non* of the rule of the common law upholding title was decisive for the determination of the case. Hence prohibition to the admiralty was granted. In the cases of 1599 and 1672, determination of the case did not depend upon whether the common law or the law administered by the admiralty would be applied (the rules of the two laws on this subject being the same). Hence prohibition to the admiralty was denied.¹⁸³

There is another mixed case, in which a conflict is found between the English law and a foreign law. In the *Bridgeman* case (1614),¹⁸⁴ the master of an English vessel sent to Spain, borrowed

money from Bridgeman "on the high seas," and impawned the ship for repayment of this loan; "the contract was made in Sevil upon the land." When the ship returned home, Bridgeman arrested it by admiralty process.

This was a case of a conflict of laws—of the law of England which was internationally competent (if it chose) to regulate powers and duties of agents of English principals, as well as rights *in rem* on an English ship; and of the equally competent law of Spain, where the contract was made and the ship was impawned. It was internationally competent for an English court to choose for application, in such a case, its own substantive law, because, while internationally both laws—that of England and that of Spain—were competent, the choice between such competent laws was a matter entirely within the discretion of the domestic *lex fori*.¹⁸⁵

But practically, for technical reasons of the English law as it then was, the case was treated and decided as one involving a conflict of jurisdictions between the British admiralty and the common-law courts. Under the common law such contract would not bind the ship, while under the law of the admiralty it would. In order to have the rule of the common law applied, the case had to be determined by the common-law courts. Hence, the admiralty had to be prohibited to take jurisdiction of this case. Prohibition was granted, "whereof the reasons were that by the Common Law by which properties were to be tried, the master of the ship could not impawn the ship," and because "the Admiralty Court hath no power over any cause at land . . . and . . . it is not for a marine cause" (as there was no necessity of a marine character to borrow money).

In a case of 1618,¹⁸⁶ the defendant gave jewels to his servant, who was to go to Barbary and to sell them there; the plaintiff sold them to the king of Barbary and paid the money to defendant,

but afterwards was imprisoned there for having deceived the king concerning their value or quality until he repaid the money to the king; he repaid and now sues defendant. It was held for defendant and no question of the application of any foreign law was raised or considered by the court.

In a case of 1639¹⁸⁷ a merchant in London wrote to his factor in France to buy wines and send them to London, and to charge him by bills of exchange payable in London. Wines were received and bills were drawn on and accepted by the merchant, who died before maturity of the bills, which were protested for non-payment in London. Later the factor had to pay them in France. He sued the executor of the deceased in the admiralty. Prohibition was granted "*pur ceo que cest contract ad son original en London scilicet lescrier del letter & l'acceptance del biens & bills d'exchange en London fait le contract compleate, & pur ces cest contract est destre trie al common ley.*"

Thus, in the two last cases, the legal relationship between a principal and agent was established in England, the agent acted abroad, and his claims against the principal were held subject to, and triable at, common law.

IV

It has been shown, in the preceding section, how the rule became established, for domestic, "intercounty" cases (involving matters in more than one English county), that actions on them may be brought in any one of the counties concerned, and how the principle of this rule was applied to "mixed" (English-foreign) cases (involving matters both in England and abroad).

1. In order properly to appreciate the character of the changes in the attitude of the common law toward "pure" "foreign country" cases (involving matters exclusively out of England),

it is necessary to take into consideration the changes of the law relating to domestic, "foreign county," cases.

By the end of the sixteenth century the rule became adopted¹⁸⁸ that, if an action founded on something done in one county is laid in another, the defendant may not traverse *absque hoc* that he is guilty *extra*, if his justification is not "local" in character.

Thus the notion of "transitory" actions, triable in any place where the defendant may be found, was sanctioned, and such actions became exempt from the operation of the ancient rule of locality of trials. The new rule was not extended, however, to inferior courts, with regard to which the old rule continued to be strictly enforced.¹⁸⁹

On the other hand, it was decided that if the justification of the defendant was "local," that is, depended "for its efficacy" on the actual place in which the alleged facts happened, such local actions are triable only in the locality in question.¹⁹⁰

In 1665 there was enacted a statute¹⁹¹ which provided that no stay or reversal of the verdict should be granted "for that there was no right venue, so as the cause were tried by a jury of the proper county or place where the action was laid." This provision¹⁹² was construed by the courts very liberally, and the rule was laid down that it "cured" cases of a trial in a "wrong" county, as when justification was local in another county¹⁹³ and also when the action concerned land in another county.¹⁹⁴

There were, however, still in force the old statutes of 1383 and 1403,¹⁹⁵ which expressly provided that debt and account and other such actions shall be brought only in the county where the contract was made.

The restrictive rule of these statutes was avoided by the use of the new action of *assumpsit* in cases of simple contracts (not under seal), express or implied. Originally this form of action was

employed in suits to recover damages for physical injury to the person or property of the plaintiff, caused by negligent or unskillful conduct of the defendant, who undertook to do something, but during the first half of the seventeenth century it became a flexible remedy for the enforcement of all kinds of contracts.¹⁹⁶

The use of *assumpsit* extended the notion of transitory actions to contractual obligations, and so the principle was adopted that "a contract in a particular place makes a man debtor in every place in England";¹⁹⁷ "where a man is indebted to another in one place, he is indebted to him in all places where he comes."¹⁹⁸

But even in actions of debt, etc., the strictness of the old statutory rule had gradually been relaxed.

At first, in the reign of Henry V (1413-1422), the plaintiff was examined, on oath, regarding the truth of his venue. Soon after, the practice of allowing the defendant to traverse the venue and try the traverse by the country was started.¹⁹⁹ This practice, naturally, resulted in much delay, and, therefore, a new method was introduced, apparently in the time of James I (1603),²⁰⁰ which consisted in simply changing the venue upon affidavit and motion of the defendant.²⁰¹ The plaintiff was, however, permitted to "bring back the venue" upon his undertaking to give evidence of some matter of issue in the county where the action was brought.²⁰²

The statute of 1665, mentioned above, made impossible the practice of defendant's waiting till after trial and verdict and then asking for arrest of judgment (for want of proper venue). The new practice (of changing the venue by motion) began to be applied universally.²⁰³ This enabled the plaintiff to bring such actions in a foreign county and, subject to conditions explained in the preceding paragraph, safely to prosecute it there.

On the other hand, "as . . . contracts are now dated at large, and not in any particular place, it can rarely happen that it should

appear in the declaration that the contract was made in another county.²²⁰⁴ In addition, it was held, that "unless the obligation appear in the count, or on the pleading to be out of the county, although it bear date out, it's not material where it's brought,"²²⁰⁵ as the court would not take judicial notice that any particular place was situated in any particular county.²²⁰⁶

And thus, "account, debt, covenant, and such actions, being in their nature transitory,"²²⁰⁷ were allowed to be brought in any county, for "debitum et contractus sunt nullius loci."²²⁰⁸

The defendant could, at least if the plaintiff would not undertake to give some material evidence in the county where the action was brought, change the venue in such actions.²²⁰⁹ But this, as explained above, became in many cases purposeless, and practically the notion of transitory actions was extended even to those cases which were governed by the statutes of 1383 and 1403.

Then a statute of 1705²²¹⁰ prescribed that the *venire facias* for the trial of any issue should be awarded of the body of the county where such issue is triable. Thus the ancient form of the writ from a particular venue of parish, town, or hamlet was abolished, and the place from which the jury was to be selected became determinable by the "venue in the action," that is, laid in the margin of the declaration, and not by the "fact-venue" stated in the body of the pleadings. The laying of a venue in the body of the pleadings became a mere matter of form.²²¹¹

"The principle now is, that the place laid in the declaration draws to it the trial of everything that is transitory, and it should seem, that neither forms of pleadings nor ancient rules of pleading, established on a different principle ought now to prevail."²²¹²

2. Now let cases be considered "of matters arising in a foreign country pure and unmixed with matters arising in this country."²²¹³

In the *Anonymous* case of 1589²²¹⁴ "it was agreed that where

as well the contract as the performance of it is wholly made, or to be done beyond the sea, *and it so appears*, there it is not triable in our law."

But in the meantime, the notion of transitory actions, triable anywhere in England where the debtor could be found, became adopted in domestic, "foreign county" cases. This new notion was applied to "foreign county" cases. It was only necessary to lay the venue, in such cases, in a place in England.²¹⁵ If the action was of a transitory nature, it would not be traversable whether or not the foreign place was where the venue was laid.²¹⁶

The practice of laying, in foreign cases, a fictitious venue in England appears to have started in the courts of the City of London during the early part of the sixteenth century.²¹⁷ Later on it was adopted by the general courts of common law, and, in Coke's times, was expressly approved in a series of decisions.

In 1606, in the case of an obligation dated in Athlone in Ireland, it was held that if only the place of Athlone were given, the action could not be sued in England, "*entant q Ireland ne pet estre en England*," but Athlone might be alleged to be in England and therefore such action might be sued here.²¹⁸ In 1613, an action laid in Kent on an obligation dated in Elven, in Poland, was also allowed.²¹⁹

In a case decided in 1625,²²⁰ the plaintiff declared in a debt on bill as bearing date in the parish St. Mary Le Bow in London, which actually bore date in Hamburg. Judgment was entered for the plaintiff, and Justice Doderidge said that "we ought to maintain jurisdiction of our court, if the case is not plainly without our jurisdiction, and therefore we shall take it that Hamburg is in London in order to maintain the action which otherwise would be without our jurisdiction, and while in truth we know that Hamburg is beyond the sea, as judges we do not take notice that it is beyond the sea."²²¹

As late as in 1795,²²² in a suit of the Dutch West India Com-

pany on articles of covenant "made at Amsterdam in Holland, viz. apud London in Parochia Sanctae Mariae de Arcubus in warda de Cheap,"²²³ and payable in Bank there, counsel for defendant contended that it was not triable in England, as everything is beyond the sea, but "*per totam curiam*, the action is well brought . . . and the judgment was affirmed in B. R. and in Parliament."²²⁴

The fiction was ridiculed by admiralty lawyers,²²⁵ but the common-law courts still needed it in the seventeenth and even in the eighteenth centuries, because the old rule of locality of all actions triable at common law, while already obsolete, was still treated as binding; the fiction was necessary "because we cannot proceed without it."²²⁶

So far as the statutes of 1383 and 1403 are concerned, their operation in case of actions on foreign specialties, etc.,²²⁷ was avoided by giving in the declaration a correct description of the date (foreign locality) of the specialty²²⁸ and by a *videlicet* that this locality was in the English county where the action was brought;²²⁹ then it would not "appear" that the obligation was out of the county. While, in foreign county cases, the defendant was allowed by an affidavit and motion to change the venue to the proper English county, in foreign country cases this was, of course, impossible, and the original venue laid by the plaintiff was therefore final.²³⁰ And so gradually all "pure" foreign cases of transitory nature became triable at common law.²³¹

3. The conflicts-of-laws problems created by this new development will be discussed in Sections VI and VII. Here only the effect of this change on conflicts of jurisdictions (admiralty versus common-law courts) will be considered.

In 1605, in the *Thomlinson* case²³²—action of account in the common pleas for goods received in foreign parts beyond the seas—it was held that the admiralty "hath no cognizance of

things done beyond sea, and this appears plainly by the statute of 13 Rich. 2 cap. 5, the words of which statute are, that the admirals and their deputies shall not meddle from henceforth of anything done without the realm, but only of a thing done upon the sea."²³³ This was a case on habeas corpus.²³⁴

In another case, decided in 1611,²³⁵ of a bargain made between two merchants in France ("in Marcellis"), where one libeled against the other in the admiralty for nonperformance of this bargain, prohibition to the admiralty was granted, Coke saying that 13 Richard II, c. 5,²³⁶ prohibits the admiralty from meddling with anything but things done upon the deep sea, and Justices Yelverton and Williams declaring that the admiralty has nothing to do with this bargain because it was not made upon the deep sea, and that "the bargain may be supposed to be made at Marcellis in Kent, or Norfolk or other county within England, and so triable before us . . . there were many precedents to that purpose, and day given to search for them."²³⁷

Two other cases were decided in 1611. In the first case an agreement was made, at sea, for the transportation, in good condition, of sugars, and the sugars were spoiled at sea. Prohibition to the admiralty was granted because the agreement, after having been made at sea, was later put into writing in Barbary.²³⁸ In the other case the libel in the admiralty was upon a contract "said to be made *apud Malaga inter districtum maris vocat. the Straights of Gibraltar infra jurisdictionem maritimam*."²³⁹ Prohibition was granted "because it appeared that the contract was made in the island of Malaga, and then the adding *infra jurisdictionem maritimam* is vain."²⁴⁰

In a case decided in 1614²⁴¹ prohibition to the admiralty was, however, denied. In this case contract was made at Saint Christopher's beyond the seas, by an infant as master of a ship, to carry, from there to England, certain goods which he had not delivered,

but wasted and consumed. This case appears to have followed the rule laid down in the *Anonymous* case of 1576.²⁴²

In the case of the *Spanish Ambassador* (1615-1616),²⁴³ two Englishmen came into "Spain" and there did fell and carry away so many loads of Brazil-wood, growing at Brazil. They were sued in the admiralty and prohibition was granted, Chief Justice Coke saying that "if they should there hold plea of this, this would be very prejudicial to all the course of practice . . . this may be laid to be done here, in what place the plaintiff pleaseth . . . the Admirall is like unto Neptune, and by the statute of 15 R. 2, c. 3 he is only to have jurisdiction of matters done *super altum mare*, not otherwise."²⁴⁴

In the case *Ambassador of King of Spain v. Joliff and others* (1616),²⁴⁵ two ships and their lading of divers kinds of goods of the subjects of the king of Spain were taken by pirates, Joliff and Tucker captain, on the high seas and brought by them to Ireland, where they came to the hands of Sir Richard Bingly, who converted them to his own use. The Spanish ambassador, as procurator general for all his master's subjects, libeled in the admiralty court against Joliff and Tucker and against Sir Richard Bingly. Hereupon Sir Richard Bingly prayed a prohibition, and the court

"with full and clear consent awarded a prohibition for that part of the suit only that concerned Sir Richard Bingly, allowing clearly, that they might proceed against Joliff and Tucker for that part of the suit, that did distinctly concern them, because it was laid down upon the high sea. But because Sir Richard Bingly is not said to have had any hand in the first taking at sea, but apart by himself, in that the goods came after to his own use, which is his particular charge, that part of the suit belongs not to the Admiral's Court, because it is not laid to be done at sea.

"Now the whole court resolved clearly, that the Admiralty of England can hold no plea of any contract, but such as riseth upon the sea:

no, though it rise upon any continent, port, or haven in the world, out of the King's dominions, for their jurisdiction is limited by the statutes to the seas only; for the admiral is for the sea, and the Court for maritime purposes. And therefore if any stranger or other will seek justice at the hands of the King of England, for wrongs done him out of his dominions, he must seek it in those courts that have jurisdiction over the cause. Now if the cause rise at land, or in a port (for no port is part of the sea, but of the continent) then he cannot sue in the Admiralty but he must sue in the Courts of Common Law, which have unlimited power in causes transitory. And then it must be so laid, that it may give jurisdiction.²⁴⁶

The cases above held that admiralty has no jurisdiction over things done beyond the seas. Note, however, that in the *Thomlinson* case,²⁴⁷ *supra* this section, the court declared that "things transitory done beyond the seas, either are triable in the King's Courts, or the party grieved may have his remedy before the justices where the fact was done beyond the seas." (Italics supplied). In the *Anonymous* case, decided in 1611,²⁴⁸ it was suggested that the case might be tried at common law by supposing the transaction had taken place in England. Chief Justice Fleming, however, was against prohibition, because, he said, the common-law courts in any case could not hold plea of a contract made in France.²⁴⁹

But ousting admiralty from cognizance of *all* cases involving matters on land anywhere (in England and beyond the sea) was, at the time in question, *à l'ordre du jour*,²⁵⁰ because the common-law courts already were taking hold of all mixed cases (Section III, above)—those partly involving matters on land in England, and partly involving matters on the sea or beyond the sea—and because in such mixed cases the sweeping rule was laid down that admiralty had jurisdiction only if the entire matter took place on the sea.²⁵¹

V

The development of the law analyzed in the preceding section created a novel and difficult situation.

For centuries the idea had been prevailing in England that causes governed by a given law were determinable by courts administering that law and not by any other courts.²⁵² The common-law courts were determining only local English causes and were administering the common law. They were not determining any other causes, nor were they taking cognizance of any other law.²⁵³

At the beginning of the seventeenth century, however, the common law adopted the new notion of transitory causes and gradually extended it to causes that, previously, were determinable by other courts and were governed by a law other than the common law.

It was at that time only, that is, in the seventeenth century, that the English common law had, for the first time, to face the problem formulated at the beginning of this study, *viz.*, whether the substantive law of the common-law forum shall, or shall not, be the rule of decision in such "foreign" cases.

This was a difficult problem because it suggested a radical departure from the old principle according to which the courts were administering their own law exclusively.

1. In case of *mercantile* causes a solution that appeared to be in harmony with the old principle was found.

For centuries commercial causes were determined by a law of their own, the law merchant. This law was "law of nations"²⁵⁴ and was administered in England by special courts²⁵⁵ and by the admiralty.²⁵⁶ Being administered in England, it was a law of England.²⁵⁷ For the common-law courts, however, it was a foreign law, which they did not administer.²⁵⁸

At the beginning of the seventeenth century the common-law courts started to hear cases based on the law merchant.²⁵⁹ Originally they applied the law merchant only in cases of foreign transactions. Bills of exchange, at first, were extended only to merchant strangers trading with English merchants.²⁶⁰ During this period the common-law courts appear to have treated the law merchant not as a law but as a custom. The rules of the law merchant had to be pleaded specially, and proved, each time, as a fact.²⁶¹

From the middle of the century, however, bills of exchange were extended "to inland bills between merchants trading one with another here in England, and, after that, to all traders and dealers, and of late, to all persons, trading or not."²⁶² After the Restoration (1660) the common-law courts had almost exclusive jurisdiction over cases based on the law merchant. The rules of that law gradually ceased to be treated as questions of fact. In 1691 it was declared that the judges were bound to take notice of the law of merchants.²⁶³ In 1699, Justice Treby declared, with reference to bills of exchange, that there no longer was any need to allege and prove the custom.²⁶⁴

And so, gradually, the law merchant became "part of the Common Law"²⁶⁵ The ancient principle was preserved intact—the common-law courts still administer only their own, the common, law! They do not administer a law merchant that is "foreign" to them. The law merchant is now "received," has become "incorporated," into the common law!

This process of "incorporation" was not completely effected till the time of Lord Mansfield.²⁶⁶ Commercial cases decided by him definitely transformed former rules of the law merchant into rules of the common law. But then the process of incorporation was replaced by a new process—one of "assimilation" and "municipalization" of that formerly "international" branch of the law of England. As the result of the accumulation of judicial

precedents and of legislation, there arose the "English" commercial law as one of the branches of the "municipal" law of England.²⁶⁷

Originally rules of the law merchant were applied to *all* cases, foreign and domestic. No foreign municipal law would be applied in a foreign commercial case because, as Lord Mansfield said, "all nations ought to have their laws conformable to each other, on such commercial cases."²⁶⁸ But when, later on, the process of municipalization and of separation of municipal commercial law in different countries went far enough, foreign cases could no longer be determined by rules of the international and universal law merchant, which, to a great extent, ceased to exist and was no longer recognized. Application, in proper cases, of foreign municipal law became unavoidable. This situation in commercial matters, however, did not arise until the nineteenth century, when the English courts had already adopted the modern doctrines of conflicts of law (Section VII, below).

2. *Rules of public international law*, in so far as applicable in cases which were determined by the common-law courts, underwent a similar transformation. They were declared to be "part of the law of the land,"²⁶⁹ "part of the Common Law,"²⁷⁰ to be administered by the common-law courts whenever a proper occasion for their application arose.²⁷¹

The subsequent development was substantially analogous to that of the law merchant. So far as domestic cases were concerned, involving, for example, immunities of foreign diplomatic agents in England, rules of international law were definitely transformed into rules of the common law itself!²⁷² Not so, of course, in foreign cases, or cases involving international obligations of the British Crown as such. In such cases any reference to incorporation of the international law into the common law was impossible and, of course, was not made.²⁷³

VI

The situation regarding foreign cases, raising questions of some foreign municipal law, was far more difficult than that of cases (foreign and domestic) involving questions of the law merchant. The law merchant could be "received" and "incorporated" into the law of England and, later, into the common law, because it was actually administered in England, originally by special tribunals and later on by the common-law courts, and because it actually ruled not only (mixed or pure) foreign commercial cases but inland transactions in England as well. Foreign municipal law, on the other hand, was not "law of nations," was not administered by any tribunal in England, was not a "custom" in England which could be "found" by an English jury,²⁷⁴ and thus was not, and could not be, adopted as one of the branches of the law of England. The old rule of exclusive application by the forum of its own substantive law could be maintained in cases (foreign or domestic) under law merchant. But this rule could not be followed in foreign cases, involving questions of foreign municipal law.

For more than one hundred years, until the middle of the eighteenth century, the common-law courts were not certain whether they should decline jurisdiction over such cases, or abandon the old rule of exclusive application of the substantive law of the forum.

1. It was easy for equity to exercise its power over "the conscience of the person living here"²⁷⁵ so as to affect property, even land, in a foreign country, because *in such cases there was no question of application of any foreign law*,²⁷⁶ and the only questions to be considered were those of facts, abroad or in England, and of the principles of equity itself.

2. Again, it was easy for the common-law courts to assume jurisdiction over mixed cases of things partly done within the

body of an English county, and partly done on the high seas or on land beyond the sea, if the foreign matter involved only a question of fact, because such a case would be determinable exclusively by the rules of the common law.²⁷⁷ Then also cases involving a conflict between the common law and some foreign law could be determined by the common-law courts, because in such cases the common law would be given "preference," and the court would not have to take cognizance of, and apply, any foreign municipal law.²⁷⁸

3. But some cases, not only pure foreign cases but also mixed cases, may involve questions of foreign municipal law! What to do with such cases?

In two cases the courts declared their willingness to take cognizance of the foreign law involved.

Thus in the *Anonymous* case of 1611,²⁷⁹ the following was stated:

"Walmesley and Warburton Justices agree, that if a thing be done beyond the sea, and may be tried by the common law, there the Admiral Court shall have no jurisdiction. But if an allegation bears date beyond the sea, or be so local that it cannot be tried by the common law . . . prohibition shall not be awarded, for it is not to the prejudice of the King nor of the Common Law. But if the party can have his remedy by the common law, the common law shall be preferred. And if at the common law one matter comes in question upon a conveyance or other instrument made beyond sea according to the course of the civil law, or other law of the nations where it was made, the Judges ought to consult with the civilians or others which are expert in the same law, and according to their information, give judgment, though it be made in such form, that the common law cannot make any construction of it." (Italics supplied.)

In a case decided in 1625,²⁸⁰ the contract was to be performed abroad. Suit was instituted in the admiralty. Prohibition was

granted because, the contract having been made on land, the admiral was held not to have jurisdiction. It was said that if the contract were made beyond the sea, *assumpsit* would still lie if the contract would be "supposed" to be made in an English county. It was also agreed that the laws of other nations might be admitted in evidence in such a case.²⁸¹

But in another case of 1625,²⁸² of a contract made and performable in Virginia, sued upon in the admiralty to recover damages for its nonperformance, prohibition to the admiralty was denied!

It is very instructive to note the grounds of this decision as revealed by (not very clearly) reported opinions of the judges who decided the case. Justice Jones asserted that the common-law courts might apply, in a proper case, foreign law; hence the common-law courts could take jurisdiction of this case, and therefore, prohibition should be granted.²⁸³ But Justice Whitlock said that the admiralty should have jurisdiction, *because the common law did not apply to this case!*²⁸⁴ Justice Doderidge admitted that the admiralty had jurisdiction, but declared that the plaintiff might elect to sue at the common law,²⁸⁵ perhaps meaning that, in this last case, the common-law courts would be free, at least as against the plaintiff, to administer the common law.²⁸⁶

4. That the common-law courts were reluctant, at the time in question, to assume jurisdiction over foreign cases, which require the application of foreign law, clearly appears also from the terms of the compromise attempted in 1632 between the common-law courts and the admiralty.²⁸⁷

The arrangement in question contained the following provisions, among others:

"First, if sute should be commenced in the Court of Admiralty, for *contracts or other things personally done beyond the seas*, no prohibition is to be awarded;

"Secondly, if sute be before the Admirale for freight, or mariners'

wages, or for breach of charter-parties, or for voyages to be made beyond the seas; though the charter-party happen to be made within the realm, so as the penalty be not demanded, a prohibition is not to be granted; but if the sute be for the penalty; or if the question be *whether the charter-party were made or not, or whether the plaintiff did release* or otherwise discharge the same *within the realm*; this is to be tried in the King's Courts, and not in the Admiralty." (Italics supplied.)

(Sections 3 and 4 gave to the Admiralty jurisdiction in cases of maritime character arising entirely within the realm.)²⁸⁸

Thus foreign cases were left to the admiralty, and so were also mixed cases of maritime contracts made in England but performable without the realm. Only controversies concerning creation and discharge of maritime contracts *in England* were appropriated by the common-law courts.

This agreement is reported to have been acted upon only for a few years.²⁸⁹ But during the Commonwealth an ordinance, made by Parliament in 1648, confirmed jurisdiction of the admiralty over maritime cases, including maritime contracts made beyond the seas.²⁹⁰ This ordinance, it is true, expressly excluded from cognizance by the admiralty cases of bills of exchange or accounts between merchants or their factors. But those were cases under law merchant, which was then being incorporated into the common law (Section V, above).

The situation in the seventeenth century was, therefore, as follows: The admiralty was often prohibited from taking jurisdiction of "foreign" cases; on the other hand, the common-law courts hesitated to assume jurisdiction of such cases; but the economic and financial relations of England with foreign countries were growing, and they needed legal protection in England.

5. Under these conditions the doctrine gradually became adopted that foreign cases, at least as a rule, should be left to be determined by foreign courts administering the foreign law ap-

plicable to such cases,²⁹¹ and that the English courts, therefore, should, on proper occasions, give effect to foreign judgments in England.

The earlier theory in this matter seems to have been that the English courts were bound to enforce foreign judgments, because by the law of nations States are bound to aid the justice of one another, and because the courts of England do take notice of the law of nations (compare with Section V, above).

Thus in the *Wier's Case*²⁹² decided in 1607, a judgment in debt had been rendered in Holland against an Englishman, who fled from execution to England. The judgment being certified, the Englishman was imprisoned by the admiralty for the debt. The King's Bench, upon habeas corpus, held the imprisonment to be lawful:

"The judge of the Admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by common law, for this is *by the law of nations that the justice of one nation should be aiding to the justice of another nation*, and for one to execute the judgment of the other, and the *law of England takes notice of this law*, and the judge of the Admiralty is the proper magistrate for this purpose, for he only hath the execution of the civil law within the realm." (Italics supplied.)²⁹³

In 1670, it was declared²⁹⁴ that, "where sentence is obtained in a foreign admiralty, one may libel for execution thereof here, because all courts of Admiralty in Europe are governed by the civil law, and are to be assistant to one another, *though the matter were not originally determinable in our court of Admiralty*." (Italics supplied.)

In a case of 1683, "the chief question" was whether sentence of the admiralty of France condemning a British-owned vessel as a prize "shall be examined by the Common law? and resolved,

it shall not, because . . . we ought to give credit to it, or else they will not give credit to the sentences of our courts of Admiralty."²⁹⁵
 "It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars."²⁹⁶

In a case of 1678-1679,²⁹⁷ of a copartnership at Leghorn, where one of the partners had been forced, by sentence of the court at Florence, to pay custom to the great duke for goods imported during the time of the former copartnership, it was held that he was entitled to so much of the money brought into court and belonging to the partnership "as may be adequate to the sum paid on the sentence for custom, *the justice of which is not examinable here.*"

In *Cottingham's* case, in 1688,²⁹⁸ a petition to the Lords was considered in Parliament, to be relieved "against a sentence by the delegates in a matrimonial cause, wherein they adjudged, as the Court of the Arches had done before, that Signora Angela Margarita, a very lewd woman, was the petitioner's lawful wife, and lawfully married to the petitioner at Turin, whereas in Turin she hath another husband yet living, and though she were divorced from that husband by the sentence of the Archbishop of Turin before the pretended marriage to the petitioner, yet he doubted not . . . that the sentence was void . . ."

Said Lord Chancellor Nottingham:

" . . . the merits of this case, if the petitioner could come at it, were to examine a sentence of the Archbishop of Turin, by the laws of England, for as *we know not the laws of Savoy, so, if we did, we have no power to judge by them;* and, ergo, *it is against the law of nations not to give credit to the judgment and sentences of foreign countries, till they be reversed by the law, and according to the form, of these countries where they are given.* For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence

take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences?" (Italics supplied.)

In *Burroughs v. Jamineau*,³⁰⁰ decided in 1726, bills of exchange were drawn in London but negotiated, endorsed, and accepted at Leghorn, in Italy. The acceptor obtained a judgment at Leghorn vacating the acceptances because the drawer failed without leaving effects in the acceptor's hand. Being afterwards sued at law in England by subsequent holders of the bill, he applied to the court of chancery and obtained a perpetual injunction. Lord Chancellor King

"was clearly of opinion that *this cause was to be determined according to the local laws of the place where the bill was negotiated*, and, the pl's acceptance of the bill having been vacated and declared void by a court of competent jurisdiction, he thought that that sentence was conclusive and bound the court of Chancery here." (Italics supplied.)³⁰¹

Thus the above cases appear to have been based on the following theory: The proper forum for foreign cases is where the foreign law ruling such cases is being administered; English courts do not administer foreign laws and, therefore, cannot reverse decisions based on such laws; English courts do take notice of the law of nations, and by that law they are bound, on proper occasions, to give effect to foreign judgments.³⁰²

Later on, a somewhat different theory was laid down, according to which "if a competent court held that a sum is due, there is obligation on the debtor to pay, and action for this purpose may be instituted"³⁰³ in an English court.

Therefore, it is submitted, under the original influence of the circumstances described in this section, the rule became established in England that a foreign judgment creates a new cause of action, in the nature of a simple contract,³⁰³ suable upon in Eng-

land, as such debt,³⁰⁴ and, therefore, without any condition of reciprocity.³⁰⁵ The substance of the foreign judgment will not be reviewed by the English courts,³⁰⁶ and they will not consider whether or not the law was correctly applied by the foreign tribunal. The English courts will investigate only whether or not the judgment was rendered by a tribunal having jurisdiction (in the international-law sense of the word), and whether or not it was obtained by fraud,³⁰⁷ both being questions which do not require reference to rules of a foreign "municipal" law!

VII

After the Restoration (1660), the admiralty was limited, almost exclusively, to the cognizance of cases that happen on the high sea and are maritime in their nature,³⁰⁸ and the common-law courts obtained exclusive jurisdiction in England over all other foreign cases.

In the meantime the dominion of the English Crown was extended to many new lands. When Wales was united to the Kingdom of England it was prescribed that the laws of England should be used in Wales.³⁰⁹ The conquest of Ireland began in the twelfth century, but was completed only in the seventeenth century.³¹⁰ The common law of England was made the rule of justice in Ireland,³¹¹ and the House of Lords later became the common supreme appellate tribunal for the United Kingdom.³¹²

The islands adjacent to England, which were already united to the English Crown by the princes of the Norman line, continued, however, to be governed by their own laws.³¹³ In so far as distant possessions and colonies were concerned, those which were uninhabited and discovered became subject to the English law,³¹⁴ but in conquered or ceded countries that already had laws of their own these laws remained in force until altered.³¹⁵ Appeals from these possessions and colonies were heard by the Privy Council,

and, of course, they were determined by reference to the law of the given possession or colony.³¹⁶ For the Privy Council, however, these cases were not foreign cases, nor was the given law applicable to the given case a foreign law. Every given case was a *local* case of the possession, and the law applicable to such a case was the *local* law of the same.

Scotland, notwithstanding the union of crowns on the accession to the English throne (in 1603) of King James I (VI of Scotland), continued a separate kingdom until the act of Union of 1707,³¹⁷ when the United Kingdom became represented by one parliament. "The municipal law of Scotland" was, however, "ordered to be still observed" on that part of the island.³¹⁸ The House of Lords became the supreme tribunal for the United Kingdom. But for the House of Lords, as the appellate tribunal for Scotland, Scottish cases were not foreign cases, and the Scottish law was not a foreign law.³¹⁹

While the administration of justice in cases coming from these different lands of the British Crown did not contribute, by itself, to the development in England of doctrines on conflicts of laws, nevertheless the fact of agglomeration, under the British Crown, of lands having different laws of course stimulated intercourse between them and with the metropolis, which in its turn created many causes of action arising in these places, which cases needed judicial protection or enforcement in England.³²⁰ But the process of gradual adoption of the modern doctrine of conflicts of laws went very slowly.

1. In the first place let cases of *contractual obligations* be considered.

In *Beven v. Clapham* (1664),³²¹ debt was contracted at Tenerife beyond the sea, action was brought in London, defendant pleaded that he did not promise within six years, and plaintiff replied that action was brought within six years of the return of the plaintiff.

It was held that this was "within the reason and intent of the [English] statute," and judgment was given for the plaintiff. No question of foreign law was raised or decided.

In *Blankard v. Goldy* (1693), in debt on a bond, the defendant averred that the bond was given for a purchase of a judicial office in Jamaica and pleaded the statute Edward VI against buying such offices. It was held that the laws of England did *not* take place there, as their laws did not entirely cease by conquest, and judgment was rendered for the plaintiff.³²²

In 1700, *Ranelaugh v. Champante*, debt being contracted in Ireland, and bond to secure it being given in England, it was held that it should carry English interest.³²³ In *Dungannon v. Hackett*, decided in 1702,³²⁴ debt was contracted in Ireland, for which bond was given. It was held that interest must be paid "according to the law of the country where debt was contracted, not according to that where debt is sued for."³²⁵ These and some other cases, however, practically dealt with the question of whether the rate prevailing in one or in another place should be charged, depending upon economic and other considerations of factual character,³²⁶ and, in some cases, with the question whether the English law against usury is, or is not, applicable.³²⁷

In *Foubert v. Turst* (1703) there was made in Paris on the marriage of two French people a contract touching the wife's fortune and providing that they should be "joint and common in their property pursuant to the custom of Paris." Afterwards, on account of persecution, both fled to England where the wife died. Her relations instituted a suit in chancery against the husband, claiming eight hundred livres as the deceased's proper estate, and moiety of the estate in common. It was urged on behalf of the defendant that the estate, concerning all such things as were not specifically agreed upon but only left to the custom of Paris, ought to go according to the laws of England, by which husband

would be entitled to the entire personality. "It would be strange, if . . . an English court of justice should be obliged to execute such French laws and customs." Plaintiffs answered that "the specific performance of this contract was [their] object, but by no means an attempt to introduce foreign laws or customs as binding here, any otherwise than by express and positive agreement," and that "the saying [in the marriage contract] the rest should go according to the custom of Paris, is as much as if the custom had been recited at large." Lord Keeper Wright decreed to the plaintiffs relief only concerning eight hundred livres, but on appeal to Lords they had relief for the whole.³²⁸ Thus the case was treated and decided as one relating to the execution of a special provision of the contract "by no means involving an attempt to introduce foreign laws."

An interesting case was decided in 1706.³²⁹ It was an *indebitatus assumpsit* for twenty pounds for a Negro sold by plaintiff to defendant, "viz. in parochia Beatae Mariae de Arcubus in Warda de Cheape." Verdict was for the plaintiff, and defendant moved in arrest of judgment. The situation was very piquant indeed, because, to place the case within the jurisdiction of the English court, plaintiff had to allege that the sale was made in England (in the ward of Cheap), but he could not do this, because "as soon as a negro comes into England, he becomes free,"³³⁰ and will not be salable as a chattel! Chief Justice Holt is reported to have said in the first place: "You should have averred in the declaration that the sale was in Virginia, and by the laws of that country, negroes are saleable." But this again would not have helped plaintiff, since in such a case the foreign locality of the action would appear in the pleadings and would make it, therefore, not triable in England! Then Holt, upon second thought, "directed the plaintiff should amend, and the declaration should be made, that the defendant was indebted to the plaintiff for a negro

sold here at London, but that the said negro at the time of sale was in Virginia, and that negroes by the laws and statutes of Virginia are saleable as chattels." Thus recourse to foreign law was taken here only for the purpose of avoiding operation of the substantive *lex fori*, which would have made the plaintiff's claim invalid; therefore, a fictitious *locus actus* was created in England—to give to English courts jurisdiction; while the foreign place was treated as *locus rei sitae* to uphold validity of the contract!

In *Robinson v. Bland* (1760), debt was contracted (money was won, and money was lent) between two English subjects in France, and was payable in England. Lord Mansfield declared that "the general rule, established *ex comitate et iure gentium* is that the place where the contract is made, and *not where the action is brought*, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties had a view to a different Kingdom." He held that English law governed, on the ground that "the law of the place can never be the rule, where the transaction is entered with an express view to the law of another country," citing for this proposition Huberus and Voet, Dutch authors of the end of the seventeenth century.³³¹ But Justices Denison and Wilmot concurred on the ground that the plaintiff has appealed to the laws of England by bringing his action there and ought to be determined by them.³³²

2. In the series of *tort* cases, the first one to be mentioned is the *Blad's* case (1673)³³³ (seizure by a Dane of an estate of English subjects in Iceland), where Lord Nottingham, in the Privy Council, declared that "whatever was law in Denmark, would be law in England in this case, and would be allowed as a very good justification in the action." But when later (1674) the defendant asked, in Chancery, perpetual injunction to restrain proceedings at law against him, because the seizure was sanctioned by the Danish authorities, such injunction was granted, though

the plaintiffs contended, that "whatever could avail him here, would also avail him at law," because, "to send it to a trial at law, where either the court must pretend to judge of the validity of the King's patent in Denmark, or . . . that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd." This interesting case dealt with what later on would have been called a foreign "act of State," which was held not to be subject to judicial inquiry in England.

In 1700, in *Lord Bellamont's* case,³³⁴ motion by the attorney-general for trial in an action against the governor of New York, for matter done by him as governor, was granted, "because the King defended it."

In *Rafael v. Verelst* (1774-1776),³³⁵ a suit by Armenian merchants against Verelst, governor of Bengal (president of Calcutta) and chief local officer of the East India Company, for arrest and false imprisonment within the territory of a sovereign prince of India and continued in Bengal, jurisdiction was sustained, and Chief Justice De Grey declared that "personal injuries are of a transitory nature and *sequuntur forum rei*. And though in all declarations of trespass it is laid *contra pacem Regis*, yet that is only matter of form, and not traversable."

In the leading case, *Mostyn v. Fabrigas*,³³⁶ decided in 1774 by Lord Mansfield—trespass and false imprisonment by a native Minorcan against the governor of Minorca, committed in Minorca—Lord Mansfield analyzed the doctrine of venues and the legal nature of transitory actions and held that the action is maintainable in England.

The three last cases discussed above were cases of personal torts by English subjects who were officers of the Crown (or, in case of Verelst, of the East India Company), and the torts were committed in English colonies. It was held they were amenable to

the jurisdiction of the English courts.³³⁷ The question of the application of foreign law appears to have been considered only in the *Mostyn* case.³³⁸ In that case, it was argued for the defendant that "the cases where the courts of Westminster have taken cognizance of transactions arising abroad, seem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of England, and between English subjects . . ."³³⁹

It may be pointed out here that as late as in the second half of the nineteenth century the English courts, in case of foreign torts of a transitory character, actually "administered" the substantive *lex fori*. They held that a foreign tort may be sued in England only "if it would have been actionable, if committed in England,"³⁴⁰ and that acts done abroad, though not actionable where committed, will make a good cause of action in England (if similar acts in England would be actionable), provided only such acts were not "justifiable" where committed.³⁴¹ A remarkable instance of administering the substantive *lex fori* in cases where that law was clearly incompetent!³⁴²

3. In a series of cases touching *real property abroad*, the old principle of locality (*supra*, Section I) was upheld.

These were, in the first place, cases of actions for damages for trespass upon, or injury to, real estate: *Skinner v. The East India Company* (1665)³⁴³ and *Shelling v. Farmer* (1726),³⁴⁴ which held that these actions could not be tried in England.

Lord Mansfield referred, in the *Mostyn* case (1774), to two earlier decisions (not reported elsewhere), in which he had entertained jurisdiction of action for damages to real estate³⁴⁵ lying in Nova Scotia and Labrador, respectively, where no local courts had yet been instituted.

But in *Doulson v. Matthews* (1792),³⁴⁶ an action for trespass for entering the plaintiff's dwelling house in Canada and expel-

ling him, it was held the action would not lie, and Justice Buller said: "It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions: it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here which are in their nature transitory though arising out of a transaction abroad, but not such as are in their nature local."

Even in the second half of the nineteenth century, the old principle of locality of actions was applied in a personal action involving real property abroad. Notwithstanding the abolition, in 1873-1875,³⁴⁷ of former rules with regard to venue in case of local actions, the House of Lords held, in *British South Africa Company v. Companhia de Moçambique*³⁴⁸ (claim for damages caused by breaking, entering, and taking possession by the defendant of the plaintiff's land in South Africa), that it had no jurisdiction, because the question depended upon claims of title to foreign land, though "it is by no means certain that any rule of international law would be violated" if the court had adjudicated upon such title and enforced its adjudication in personam.

The other group of such cases was that of actions of debt for arrears of a rent charge when based upon privity of estate.³⁴⁹ In *Barker v. Damer* (1691), an action for rent by the grantee of the reversion against the assignee of the lessee, land in Ireland, and rent payable in London, it was held that such action was local, because founded on the privity of estate, and therefore did not lie in England.³⁵⁰ In *Wey v. Rally* (1704),³⁵¹ an action of debt by lessor against lessee for rent upon a demise at London of lands in Jamaica, it was held that the action was transitory, as based on the privity of contract, and, therefore, "the principal cause [being] within the jurisdiction, if an issue depending on foreign law arises, it may be tried in the next county, and foreign laws given

in evidence.³⁵² But in 1875 the rule was laid down that an action of debt for arrears of a rent charge upon lands abroad cannot be tried in England.³⁵³

In 1763, in *Pike v. Hoare*³⁵⁴—will made in England, estate in Pennsylvania—the validity of the will was held not triable at Westminster Hall, because “*each Colony and Factory have distinct laws of their own. Judges in Westminster Hall are not acquainted with the laws of the several Colonies and Factories; they are local.*”³⁵⁵ (Italics supplied.)

In 1709, in an action of trover for timber cut in Ireland, to which it was objected that it could not be tried in England because title of land would come in question, it was held by Chief Justice Holt, *et totam curiam*, that the action was transitory and might be sued anywhere.³⁵⁶ Note, in this respect, that it was held, already in the seventeenth century,³⁵⁷ that in case of conflicting rights to a *res*—one right acquired abroad, another in England—the right created by the common law of England should be given preference.

4. Matters of *inheritance* were dealt with in a case of 1723. The testator, domiciled in Holland, devised his houses in Holland to the plaintiff and bequeathed all the residue to the defendant, whom he made his universal heir and executor. Some of the property was in England. By the law of Holland both real and personal estates were liable to satisfy the debts of the decedent. The houses were taken into possession by the creditors, and devisees sued the residuary legatee to be recompensed out of English personalty. The case was treated, according to the syllabus, as involving construction of the will (“how it must be construed, so as to take effect, notwithstanding the difference of the laws of each country”), and it was held for the plaintiffs. No question of the application of foreign law was involved or considered in the case.^{357a} In *Pipon v. Pipon* (1744), Lord Hardwicke refused to

restrain the administratrix from taking to Jersey the personal estate, in England, of an intestate, resident of Jersey, and to have it distributed according to the English law, saying: "The locality could not prevail, for it would be extremely mischievous, and would affect our commerce. No foreigner could deal in our funds but at the peril of his effects going according to our laws, and not those of his own country."³⁵⁸ No question of the application of foreign law was involved in this case.

In *Thorne v. Watkins* (1750)³⁵⁹ the chancellor laid down a similar *negative* rule and said: "otherwise it would destroy the credit of the funds, for no foreigner would put into them, if *because a title must be made up by administration or probate of the prerogative court of England, it was to be distributed different from the laws of his own country.*" (Italics supplied.)

5. Two *foreign bankruptcy* cases (1764 and 1769) gave effect in England to an assignment of property of a bankrupt merchant in Amsterdam to "curators of desolate estates" in Holland, and held that they could recover debts due the bankrupt in England, in preference to the diligence of a particular creditor seeking to attach those debts, and could take the money to Holland (to be distributed there by local authorities in accordance with the law of Holland).³⁶⁰

6. So far as *marriages* are concerned, Lord Hardwicke, in 1748,³⁶¹ declared that marriage abroad, established as valid by a sentence of a foreign court having proper jurisdiction, is to be treated as valid in England.

In *Scrimshire v. Scrimshire* (1752),³⁶² decided in the ecclesiastical court, the question was: "validity of marriage of British subjects contracted abroad, how far considered, by the law of England, to depend upon the law of the country where it is celebrated." The case was declared by the court to be "*primae impressionis.*" A clandestine marriage was celebrated in France;

it was forbidden by the laws of both countries, but by French law it was absolutely null, while by English law it was not null unless under circumstances that warranted the court to put that construction upon it. The suit was brought by the lady for restitution of conjugal rights. The Parliament of Paris had already declared the marriage void. The English court held that French law was determinative of the case, as *lex loci actus*, and as authority for this conclusion a German author of the sixteenth century, Gaill,³⁶³ was cited, and declared the marriage to be null and void. Said Sir Edward Simpson: "Why may not this court take notice of foreign laws, there being nothing illegal in doing it?"³⁶⁴

To show that this was not "illegal," the following theory was stated: by *jus gentium* the validity of the marriage is determinable by the *lex loci actus*; *jus gentium* is part of the law of England; therefore, in following the rule of the *jus gentium*, the court is still administering no other but the English law!³⁶⁵ Thus foreign municipal law—*via jus gentium*—becomes part of the law of England!

The modern legal theory concerning conflicts of laws seems to have been formulated for the first time by Lord Mansfield in *Holman v. Johnson* (1775), where he said:³⁶⁶

"Every action tried here must be tried by the law of England, but the law of England says that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern."

When Sir William Scott (who later became Lord Stowell), in *Dalrymple v. Dalrymple* (1811),³⁶⁷ made his well-known statement:

"Being entertained in an English Court, this case must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of

England is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle the law of England withdraws altogether and leaves the legal question to the exclusive judgment of the law of Scotland,"

he, actually, said the same thing as Lord Mansfield had said as early as 1775.

7. Let us return to *admiralty*. In the eighteenth century, admiralty had cognizance only of contracts made and to be executed on the high seas, torts on the high seas, proceedings *in rem* on bottomry bonds executed in foreign parts,³⁶⁸ suits for wages of mariners,³⁶⁹ and enforcement of judgments of foreign admiralty courts.³⁷⁰

Thus, admiralty had to determine only³⁷¹ purely maritime cases, governed by the general law maritime.³⁷² Hence, in so far as admiralty was concerned, the old principle of exclusive administration of the substantive *lex fori* was strictly preserved!³⁷³

As late as during the entire first half of the nineteenth century the idea was still prevalent that only causes under the "general" law maritime were properly within the cognizance of admiralty, if the cases were foreign ones,³⁷⁴ and admiralty refused to adjudicate foreign cases, which depended upon rules of some foreign municipal law.³⁷⁵

In a case of 1853, an English ship was sold in a Portuguese port by the master, purchased there by a Portuguese merchant, and later arrested in Bristol. Dr. Lushington held the sale invalid according to the maritime law, because there was no urgent necessity to sell, and refused to apply the municipal *lex loci* because, he said, he was administering in the admiralty only the "general" maritime law and no other law.³⁷⁶

But, in the meantime, the English maritime law³⁷⁷ began to

grow up. The law that admiralty originally administered was the "general" law maritime. Later on, as the result of legislation³⁷⁸ and the accumulation of judicial precedents, the law administered by the admiralty changed its character and became one of the branches of the municipal law of England.³⁷⁹ And so the maritime law administered in foreign countries also changed its character.³⁸⁰ The municipal law of England not being applicable to foreign cases, and a "general" law maritime uniformly ruling *all* maritime questions no longer in existence, British admiralty had to abandon either the adjudication of foreign cases, or the old principle of exclusive administration of the substantive *lex fori*. About one hundred years after the common-law courts had done so, the admiralty abandoned the old principle in question and adopted the modern doctrine of conflict of laws.

It is interesting to note that it was in a common-law court that the suggestion was made that, in maritime cases, one should apply the competent foreign municipal law, because there is no general law maritime. In *Cammell v. Sewell* (1860),³⁸¹ a cargo was shipped in Russia by Russian merchants to an English firm at Hull on a Prussian vessel; ship and cargo were sold by the master in Norway. The validity of the sale was determined by reference to the law of Norway, and Chief Justice Cockburn said:

"The law of nations cannot determine the question, for the international law is by no means uniform as to the powers of a master, as abundantly appeared from the various codes which were brought to our notice during the argument."³⁸²

Then, in a case of 1863³⁸³ and in another of 1864,³⁸⁴ Dr. Lushington, in admiralty, adopted the rule that, in proper cases, admiralty would apply foreign municipal law.³⁸⁵

8. The old principle of exclusive administration of the court's

own law still prevails in England in the matter of *divorces*. According to the English rule, only the state of the domicile has not only legislative (substantive-law) but also exclusive judicial jurisdiction over divorces.³⁶⁶ Hence English courts are open for the divorce cases only of persons domiciled in England, and will apply the English law to such cases. They will not take jurisdiction of foreign cases of divorce; hence they will not have to "administer" any foreign law regulating such matters.³⁶⁷

The English law on the conflict of laws actually originated only in the middle of the eighteenth century, when other countries of Europe already had a developed system of rules governing conflicts of laws. The late birth of this branch of the law in England was due, it is submitted, to the special features of the English common law and of the English system of administration of justice, analyzed in the preceding sections, as they prevailed in the course of the previous centuries. These special features of the law and of the administration of justice left their imprint upon the course of development of the English law on conflicts of laws in the nineteenth century, and even upon the English law on the subject as it stands today.

NOTES

¹ Compare the concise definition of 3 BEALE, CASES ON CONFLICT OF LAWS (1902) Summary, 501: "Conflict of Laws deals with the recognition and enforcement of foreign created rights."

² (1182-1260). In a collection of *DISSENSIONES DOMINORUM*, composed between 1170 and 1200 (Haenel ed. Leipzig, 1834). Cf. 2 NEUMEYER, *DIE GEMEINRECHTLICHE ENTWICKELUNG DES INTERNATIONALEN PRIVAT- UND STRAFRECHTS BIS BARTOLUS* (1916), 66; GUTZVILLER, *Le développement historique du droit international privé*, 4 *RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL* (The Hague, 1929) 301.

³ "Quaeritur si homines diversarum provinciarum quae diversas habent consuetudines sub uno eodemque iudice litigant utrum eam iudex qui iudicandum susceperit sequi debeat? respondeo eam quae potior et utilior videtur, debet enim iudicare secundum quid melius ei visum fuerit. Secundum Aldricum."

⁴ Who wrote between 1210 and 1228.

⁵ CODEX JUSTINIANUS (529 A. D.).

⁶ First CONSTITUTIO of the title "DE SUMMA TRINITATE": "Cunctos populos quos clementiae nostrae regit imperium, in tali volumus religione versari quam divinum Petrum apostolum tradidisse Romanis religio declarat."

⁷ "Ex ista lege aperte colligitur argumentum quod imperator non imponit legem nisi suis subditis: nam extra territorium jus dicenti impune non paretur."

So also Petrus de Bellapertica (Pierre de Belleperche) (+1308), *cf. infra* note 11; and his professor, Jacobus de Ravanis (de Revignio) (Jacques de Revigny) (+1285), *cf. Gutzwiller, supra* note 2, at 314.

According to Meijers, *Histoire du droit international privé du moyen âge*, 3 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL (The Hague, 1934) 543, 594, Karolus de Tocco (+1200), commenting upon the *Constitutio* "quos clementiae," *supra* note 6, already had concluded: "Hic nota quod alios noluisset ligare nisi subditos imperio suo."

⁸ (1185-1263). *Cf. Senior, Accursius* (1935) 51 L. Q. REV. 513.

⁹ Posterior to his original gloss (1228), in which he appears to have favored application of *lex fori*. *Cf. HRABAR, ROMAN LAW AND HISTORY OF INTERNATIONAL LAW DOCTRINES, THE LEGISTS OF THE 12-14 CENTURIES*, [Yourieff (Dorpat) 1901] 46 (in Russian).

¹⁰ "Argumentum, quod si Bononiensis conveniatur Mutinae non debet iudicari secundum statuta Mutinae quibus non subest, cum dicat [scil. imperator]: quos nostrae clementiae regit imperium."

Compare this with the following statement by Karolus de Tocco, *supra* note 7: "Et est argumentum si litigat Mutinensis contra Bononiensem in hac civitate, quod statutum non noceat Mutinensi. Sed quidam contra hoc autem dicunt, argumento illo quod Mutinensis hic forum sequitur conveniendo Bononiensem, unde omnes leges illius fori recipiat."

¹¹ PETRUS DE BELLAPERTICA (+1308), *supra* note 7, REPETITIONES IN ALIQUOT DIVI JUSTINIANI IMPERATORIS LEGES (1285) (*editio princeps*, Paris 1515, also *editio Francofurti ad Maenum* 1571), *dissertatio ad L. Cunctos Populos* (*supra* note 6), 16, reprinted by HRABAR, *op. cit. supra* note 9, at 263; also in MEIJERS, BIJDRAGE TOT DE GESCHIEDENIS VAN HET INTERNATIONAAL PRIVAAT EN STRAFRECHT IN FRANKRIJK EN DE NEDERLANDEN (1914), BIJLAGE V, p. XXI: "Pone: duo litigant coram iudice in casu determinato: una est consuetudo in loco Rei, alia est consuetudo in loco Actoris, alia in loco Iudicis. Per quam consuetudinem terminatur?"

¹² *Cf. LAINÉ, INTRODUCTION AU DROIT INTERNATIONAL PRIVÉ CONTENANT UNE ÉTUDE HISTORIQUE ET CRITIQUE DE LA THÉORIE DES STATUTS ET DES RAPPORTS DE CETTE THÉORIE AVEC LE CODE CIVIL*, vol. 1 (1888), vol. 2 (1892), devoted to the period between the school of Bartolus (fourteenth century) and the French Revolution; NEUMEYER, *op. cit. supra* note 2, vol. 1 (1901), vol. 2 (1916), given to the period before Bartolus; also MEIJERS, *op. cit. supra* note 7; MEIJERS, *op. cit. supra* note 11; GUTZWILLER, *supra* note 2; *cf. also* I LAURENT, DROIT CIVIL INTERNATIONAL (1880); I CASTELLANI, IL DIRITTO INTERNAZIONALE PRIVATO (2d ed. 1895), STORIA DEL D. I. PR.; 3 WEISS, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ (1912) 8-200.

Questions of conflicts of laws appear to have been decided by the Parliament of Paris and the Exchequer of Normandy already in the thirteenth century, *cf. MEIJERS, op. cit. supra* note 11, and the same author's *Nieuwe Bijdrage tot het ontstaan van het beginsel der Realiteit* (1922) 3 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 61 *et seq.*

¹³ Applicability of the English rule that the eldest son only shall inherit. Cf. 1 CASTELLANI, *op. cit. supra* note 12, at 347; MEIJERS, *op. cit. supra* note 11, at 92, 94, and BIJLAGE XVIII; 1 LAINÉ, *op. cit. supra* note 12, at 120 *et seq.*, 154.

¹⁴ REPETITIONES, *supra* note 11, at 16, holding that the English rule is not applicable in France where the local rule is "real" in character: "Ubi est consuetudo realis: nam cum sit realis, non inspecta persona ligat res gallicanas, non personas, cum onera realia ligant res secundum consuetudinem et statutum."

So also REVIGNY, *supra* note 7 (in MEIJERS, *op. cit. supra* note 11, BIJLAGE IV), holding that "semper inspicienda est loci consuetudo in quo res sunt." Cf. also a newly edited text of Revigny, in Meijers, *op. cit. supra* note 7, at 598, n.: "Tu possides feudum in Anglia, habes domicilium hic . . ."

¹⁵ (1314-1357). IN CODICEM JUSTINIANEUM, AD PRIMUM LIBRUM, TIT. DE SUMMA TRINITATE, LEX CUNCTOS POPULOS (reprinted, with English translation, by BEALE, BARTOLUS ON THE CONFLICT OF LAWS, Cambr. 1914), holding that the solution would depend on the actual scope of the English law; cf. the famous statement: "Mihi videtur quod verba statuti seu consuetudinis sunt diligenter intuentia: aut enim disponunt circa rem, ut per haec verba: bona decedentium veniant in primogenitum . . . aut verba . . . disponunt circa personam, ut per haec verba: progenitus succedat . . ." If the English rule relates to things, it will be applied to property in England, "quia ius afficit res ipsas"; if it relates to persons, then it will not be applied to property, in England, of a foreigner, "quia dispositio circa personas non porrigitur ad forenses." "Aut talis decedens erat Anglicus et tunc filius primogenitus succederet in bonis, quae sunt in Anglia, et in aliis succederet de jure communi . . ."

¹⁶ (1363-1412). PARS PRIMA IN PRIMUM ET SECUNDUM CODICIS LIBROS, L. CUNCTOS POPULOS (editio Venetiis, 1574), holding that succession to property of a citizen of Lucca in England should be governed, in case he died (in England, 13d, or in his own town, 14) not domiciled in England, by the law of Lucca, "quam secundum illam vivere et mori voluit" (13d); but if he died in England, "ut civis et incola ibi domicilium habens," then *lex rei sitae* should be applied.

¹⁷ *Ibid.*, *supra* note 11, holding that the *lex rei sitae* will govern, so that a will made in France with seven witnesses, and valid there, will not be valid in England if English law requires ten witnesses.

¹⁸ (Durant) (1237-1296). SPECULUM JUDICIALE, lib. II, part 3, 5, no. 2: "Pone quidam Flandrensis obiit Januae et ibi in testamento suo uxorem heredem instituit; sed ecce, secundum consuetudinem Januae non potest uxor succedere viro, ex quo possessor bonorum se tuetur: in Flandriae vero est contraria consuetudo, ex quo mulier replicat. Dic, quod mulier secundum consuetudinem Flandriae, ubi litigatur, potior est in adeunda hereditate." Cf. 1 LAINÉ, *op. cit. supra* note 12, 115 *et seq.*

¹⁹ 2 KENT, COMMENTARIES ON AMERICAN LAW (1827)* 455.

²⁰ COMMENTARIES ON THE LAW OF ENGLAND (1766-1769).

²¹ JAMES HENRY, THE JUDGMENT OF THE COURT OF DEMERARA IN THE CASE OF *Odwin v. Forbes*, TO WHICH IS PREFIXED A TREATISE ON THE DIFFERENCE BETWEEN PERSONAL AND REAL STATUTES, AND ITS EFFECT ON FOREIGN JUDGMENTS AND CONTRACTS, AND MARRIAGES AND WILLS (London, 1823), noted in 2 KENT, *op. cit. supra* note 19, at 455. Cf. also PRATER, CASES ILLUSTRATIVE OF THE CONFLICT BETWEEN THE LAWS OF ENGLAND AND SCOTLAND, WITH REGARD TO MARRIAGE, DIVORCE AND LEGITIMACY (London, 1835), noted in 2 KENT, *op. cit. supra* note 19, at 117; DWARRIS, GENERAL TREATISE ON

STATUTES (1830-1831), noted by Lorenzen, 48 HARV. L. REV. (1934) 19, as containing (part II, 647-665) few pages discussing personal, real, and mixed statutes.

²² BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS GENERALLY, AND IN THEIR CONFLICT WITH EACH OTHER AND WITH THE LAWS OF ENGLAND, 4 vols. (1838), new ed. 1907-1928. Cf. also CLARK, SUMMARY OF COLONIAL LAW (1834), noted in 2 WARREN, LAW STUDIES (3d ed. 1863) 1415; HOSACK, A TREATISE ON THE CONFLICT OF LAWS OF ENGLAND AND SCOTLAND (1847).

²³ PRIVATE INTERNATIONAL LAW, WITH PRINCIPAL REFERENCE TO ITS PRACTICE IN ENGLAND (1858). SIR ROBERT PHILIMORE, COMMENTARIES UPON INTERNATIONAL LAW, fourth volume of which was given to "PRIVATE INTERNATIONAL LAW OR COMITY," appeared in 1861.

²⁴ COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (1834). The work of STORY was preceded by SAMUEL LIVERMORE, DISSERTATION ON QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS (1828). 2 KENT, *op. cit. supra* note 19, at 91, 107, 118, 431, contained a discussion of foreign marriages, divorces, judgments, and assignments.

²⁵ Cf. 1 POLLOCK & MAITLAND, HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed. 1911) 20, 21, 532.

²⁶ RUTTER v. RUTTER, Vern. 180, 23 Eng. Rep. 400 (1683). Cf. also WEBB v. WEBB, 2 Vern. 109, 23 Eng. Rep. 680 (1689), holding that though a freeman of London leaves the city and resides for many years in the country, yet on his death his personal estate shall be subject to the custom of London. Cf. *infra* note 30.

²⁷ Cf. CHOLMELY v. CHOLMELY, 2 Vern. 81, 82, 23 Eng. Rep. 663 (1688), also *infra* note 30. Cf. also PIPON v. PIPON, Amb. 26, 27 Eng. Rep. 14 (1744), where it was said for the plaintiff that the custom of the province of York is local, citing Cholmely case, *supra*, and that the party must plead the effects are within the province. Cf., however, PIPON v. PIPON (same case) in Amb. 799, 800, 27 Eng. Rep. 507, 508, where Lord Hardwicke is reported as having said: "If a man be an inhabitant of the province of York, and dies there, leaving goods both in that province, and in the province of Canterbury . . . the whole personal estate will be distributable according to the custom of the province of York . . ."

STATUTE OF DISTRIBUTIONS, 22 & 23 CAR. II, c. 10, § IV (1670), left in force the customs observed within the City of London or within the province of York. These customary rules of intestate succession were abolished only by 19 & 20 VICT. c. 94 (1856). Cf. REPPY & TOMPKINS, HISTORY OF THE LAW OF WILLS (1928) 8, n. 54, and 272.

By 4 & 5 W. & M., c. 2 (1692), and 2 & 3 ANN., c. 5 (1703), the customary rule of York, according to which widows and younger children of persons dying *inhabitants of that province* are entitled to a "reasonable part" of the personal estate of the decedent, was abolished, and it was made lawful, "for any person inhabiting or residing, or who shall have goods or chattels within the province of York," to dispose of his personal property by will as he thought fit. In *Sommerville v. Sommerville*, 5 VES. JUN. 750, 790, 31 Eng. Rep. 839, 860 (1801), Sir R. P. Arden, M. R., said that, in view of this wording of the statute, "it was supposed the custom would attach upon any property locally situated there; though the party was not resident, and . . . our Spiritual Courts inclined to the *lex loci rei sitae*. . ."

In addition, similar statutes were enacted to abolish the custom of Wales, 7 & 8 WILL. III, c. 38 (1696), and that of London, 11 GEO. I, c. 18 (1724), which customs similarly

limited the right of testation. *Cf.* REPPY & TOMPKINS, *op. cit. supra*, 8, n. 54, and 200-202.

²⁸ *Cf.* Matthews v. Newby, 1 Vern. 134, 23 Eng. Rep. 368 (1682), holding that when a freeman of London died intestate, leaving wife and no children, the testamentary part of his estate belongs by custom to his wife, as administratrix, and is not distributable by the statute. But Percivall v. Crispe, 2 Show. K. B. 175, 89 Eng. Rep. 871 (1682), held that the third of the effects of an intestate freeman of London given to his administrator by the custom of London shall be distributed according to the statute.

At the time in question the person to whom the administration was committed was practically the only successor recognized. *Cf.* Carter v. Crawley, T. Raym., 496, 500, 83 Eng. Rep. 259 (1683); Palmer v. Allicock, 3 Mod. Rep. 58, 60, 87 Eng. Rep. 37 (1684).

By 1 Jac. II, c. 17, § VIII (1685), it was provided that Section IV of the STATUTE OF DISTRIBUTIONS, *supra* note 27, does not extend to such part of an intestate's estate as any administrator, as such, may claim to have, and that such part shall be distributed in accordance with the statute, and not by the custom.

²⁹ *Cf.* Goodwin v. Ramsden, 1 Vern. 200, 23 Eng. Rep. 412 (1683); also Gudgeon v. Ramsden, 2 Vern. 274, 23 Eng. Rep. 777 (1692), where the intestate, inhabitant in the province of York, left a son and a daughter and no wife, having advanced in his lifetime the daughter in bar of what she might claim by the custom of York, held that this did not bar her distributory part by the statute of distributions; *cf.* also Stapleton v. Sherrard, 1 Vern. 305, 23 Eng. Rep. 485 (1684); also 1 Vern. 313, 23 Eng. Rep. 491 (1685); 1 Vern. 432, 23 Eng. Rep. 567 (1686); 1 Vern. 465, 23 Eng. Rep. 590 (1687), where it was held that if an inhabitant within the province of York died intestate, leaving wife and no child, the wife should have a moiety by the custom, and a moiety of the other moiety by the statute of distributions, while the York custom was that the other moiety had to go to the next of kin.

³⁰ *Cf.* Chomley v. Chomley, 2 Vern. 48, 23 Eng. Rep. 663 (1688). The intestate, who was a freeman of the city of London, died within the province of York, having a capital mansion at York, and left a personal estate of twenty thousand pounds. He was survived by two sons and a daughter. By the custom of York his eldest son, having a settlement of lands made on him, was excluded from a share of his father's personal estate. Held, that the custom of York is only local, but that of London follows the person and, therefore, should prevail.

Cf. also Thorne v. Watkins, 2 Ves. Sen. 36, 37, 28 Eng. Rep. 24, 25 (1750), *per* Lord Hardwicke: "... in the case of a freeman of London, debts due to him anywhere are distributable according to the custom (vide 2 Vern. 82) ... and of that opinion I was in Pipon v. Pipon (Amb. 25)" (*cf. supra* note 27).

Cf. also Wilkinson v. Boulton, 1 Keble 851, 868, 895, 83 Eng. Rep. 1281, 1290, 1306, 1 Lev. 162, 83 Eng. Rep. 349 (1665), where question was whether or not, by custom of London, the Court of Orphans has custody of lands of orphans all over England; held, "*per curiam*, where it's no prejudice to a third person, as mean lords, they may have custody all over England."

In King v. Harwood, 2 Lev. 31, 83 Eng. Rep. 439 (1673), question was considered whether, under custom of London for city orphans to be in custody of the mayor, a man marrying, *not in the city*, a city orphan under age without consent of aldermen in London, is punishable or not; held, Eq. Ca. Abr. 158, is punishable, for otherwise their power would be but in vain.

Cf. also *London Weavers v. Brown*, Cro. Eliz. 803, 78 Eng. Rep. 1030 (1601), custom of London that none ought to intermeddle with the art of a weaver there, but only those who are free of the guild—stranger receives silk in London, carries it to Hackney, weaves it there, then brings it back to London, and receives his pay for it; held, this is not any intermeddling in London against the custom, though the contract was made in London.

³² *Hugh le Pape v. The Merchants of Florence in London*, 8-9 Edw. I (1280-1281), 2 HALL, SELECT CASES, LAW MERCHANT (46 Selden Soc.) 34-39, also XXXIV, XLIII-XLIV, and LXI; *cf.* also 2 MARSDEN, SELECT PLEAS IN ADMIRALTY (11 Selden Soc.) XLIII *et seq.*; during the disturbances in Florence, arising out of the contests between the factions of the Guelphs and Ghibellines, the plaintiff, an Italian merchant resident in England, suffered losses in Florence, where his "towers, palaces, and houses" were destroyed by victorious Guelphs; he recovered judgment in England against members of the Bardi and Frescobaldi societies and other Florentines; judgment was reversed in error: "Eo quod non est consuetudo Anglie quod aliquis respondeat in regno Anglie de aliqua transgressione facta in extranea regione tempore guerre vel alio."

³³ *Y. B., Hil. 32 & 33 Edw. I* (1305) (Rolls series 376): "Hertepol. There is a chancery in Ireland and also a Common Bench: judgment if for receipts or contracts made in Ireland he ought to answer in this court. Moreover the custom of the company of the Lombards is this, that where the contract is made there he shall be attached and there he shall answer. Moreover, he has neither lands nor tenements in Ireland, and perchance he will never come into Ireland; therefore &c. Notwithstanding what Hertepol said, the Justice adjudged that he should not answer for the receipts in Ireland."

Cf. also *Y. B., Hil. 32 & 33 Edw. I* (1305) (Rolls series 72), suit upon debt dated at Gaweyn (Ghent?): "... Toudeby. Sir, we do not think that his deed ought to bind us, inasmuch as it was executed out of England. Howard, J. Answer to the deed. ... Hengham, C. J. You must answer to the deed; and if you deny it then it is for the court to see, if it can try, etc. Toudeby. Not so did we learn pleading. ..."

³⁴ Anonymous, *Y. B., 2 Edw. II* (1308) (1 Selden Soc. 110-111): "Et purceo qu' l fust fait Berevike ou cest Court n'avoit conissance, fut agarde que Johan ne prist rien par son fref etc." This case is also abridged in FITZHERBERT, LA GRAUNDE ABRIDGEMENT (first printed in 1514, 1565 ed.), LE SECONDE PART, t. Obligation, fol. 1, pl. 15.

³⁵ Mich. 42 Edw. III, Rot. 45, *coram rege* (1369), reported in 2 HALE, HISTORY OF THE COMMON LAW OF ENGLAND (5th ed. by Runnington, 1794) 42. Petition was delivered by the chancellor into the court of B. R. to proceed upon it; the court decided to return the petition to the chancellor: "Ideo recordum retro traditur cancellario ut inde fiat commissio domini regis ad negotia praedicta in insula praedicta audienda & terminanda secundum consuet. insulae praedictae." *Cf.* also *infra* note 44. Cases, *infra*, from Year Books, unless otherwise indicated, are cited and quoted from LES REPORTS DES CASES EN LES ANS DES ROYS . . . NOUVELLEMENT IMPRIME, CORRIGE & REVUE (1678-1680). *Cf.* BOLLAND, MANUAL OF YEAR-BOOK STUDIES (1925).

³⁶ 2 ROLLE, UN ABRIDGMENT DES PLUSIEURS CASES ET RESOLUTIONS DEL COMMON LEY (1668), fo. 571, pl. 2 and 3, reports 41 Edw. III, 41 (1368), and [Hil.] 12 Hen. IV, [pl. 12, fo.] 16 b [1411], as having held that "un chose allege destre fait oustre le mere ne poet estre trie."

Barbour, *History of Contract in Early English Equity* (4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY, ed. by VINOGRADOFF) 76, 77, quotes (from transcripts which

the author made at the Public Record) several petitions to the chancellor for relief in case of contracts made abroad. Thus, where the petitioners seek to recover money lent in France, they say: "a cause que les ditz obligacions furent fait a Caleys et non pas en Engleterre, ils ne sachent en quel Countee d'Engleterre ils purront prendre leur accion pur trier ladite some"; plaintiff, being in Rome, there lent defendant four pounds upon promise of "hasty payment as soon as they returned to England, but upon their return ... the said Abbott knowing utterly that your said beseecher can have no remedy against him by the lawes of this land for muche as ... the said money was lent beyonde the sea and not wythe in the realme ...", refused to pay; in another case petitioner says: "... for as muche as the seide bargeyn was made in the parties of beyond the see and not within this Realm, your seide beseecher hath no remedie by the common lawe of this lande, but onely by supplication afore your good and gracious lordship in the Court of Chancery"; so also in cases of obligations made at Calais and in Rouen. Cf. also BAILDON, *SELECT CASES IN CHANCERY*, (10 Selden Soc.) 58.

³⁶ Barbour, *supra* note 35, at 77: account; debt (petitioner says: "... for the said duyties growing by certeyn Contracte made by yonde the see ... [he] ... hath no remedy ... by the Commune law of his land ..."); petition against a factor in regard to a transaction in Prussia; suit for expenses incurred abroad at the defendant's request ("... for as moche as the saide expenses and costs were done oute of this lande your seide beseecher failleth remedy atte comune law"); assignment of goods made abroad. Cf. also Barbour, *id.* at 131: cases of transactions abroad with factors, in Brugges, in "Andewarp," suit being against their "Maister."

Barbour, *ibid.*, cites two cases of appeal to equity to introduce evidence of an agreement made in Spain at Calais *by way of defense to an action at law*; petitioner says it is not pleadable in bar at law "by cause it so not matter triable wyth in this lond."

³⁷ Copyn v. Snoke, Pat. 17 Rich. II, pt. 1, m. 7 (1394), 2 PLEAS ADMIR. XLIII, LIX. John Copyn sued William Snoke and another for nonpayment of a freight of wine carried from Bordeaux to a place in Essex, under a charter-party entered into at Bordeaux; proceedings were taken at common law, in admiralty, and lastly before the Constable and Marshall (cf. *infra*, note 122), but plaintiff could get no redress. The judge of the Constable's court held that he had no jurisdiction, and gave judgment against Copyn with heavy costs. Copyn appealed to the king, and judges were appointed to hear the appeal.

In Y. B., Mich. 10 Hen. VI, Pl. 47, fo. 14 (1432), case of departure from service, the court declared that "si le service duist ee fait en Franch. la condic. est void, pur c. q ne peut estre trye icy." Cf. *infra* notes 51 and 164.

³⁸ 1 LORD'S JOURNAL, p. 112, quoted in 2 SEL. PLEAS ADMIR. XLIII: "Billia per quam debita in transmarinis partibus per singraphas concessa habilia efficiuntur in hoc regno Angliae implacitari, quae quidem Billia jam prima vice est lecta et relicta."

³⁹ 1 REEVES, HISTORY OF ENGLISH LAW (Finlason's ed. 1869) 301, n.

⁴⁰ 2 HALE, H. C. L. 134. Cf. 3 BL. COMM. (1769) *379: "... the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English Law ... It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals."

⁴¹ BOLLAND, INTRODUCTION TO THE YEARBOOKS OF EDWARD II (2 Selden Soc.) XV, XVI, describing the functions of jurors of that period: "It was not until the pleadings were finished, and a direct issue had been joined between the parties that the sheriff

was ordered to have a jury of twelve at Westminster to determine it. Presumably that issue was clearly formulated and explained to them by the sheriff . . . and they had in most cases to make up their minds before they went into court what their verdict was going to be . . . A jury of the venue meant in fact, a jury of men living in such contiguity to the parties to the action and to the land, or whatever else it might be that was the subject of the action, that they might reasonably be expected to have or easily be able to get a first knowledge of the matters in issue . . . Seldom was any evidence laid before them when they got to Westminster . . . In almost every case their verdict had to be determined before they left home."

Cf. also PICKTHORN, *EARLY TUDOR GOVERNMENT*, HENRY VII (1934) 79: "It was still in Henry VII's time (1485-1500) assumed that they [the jurors] had some knowledge of their own." *Cf. infra* note 155.

⁴² *Cf.* Y. B., 48 Edw. III, fo. 6, pl. 11 (1373).

"By the policy of our ancient law, the jury was to come *de vicineto* . . . and therefore, they were summoned from the very hundred in which the cause of action arose." 2 HALE, H. C. L. 135, n. B. By 35 Hen. VIII, c. 6, § 3 (1543), six hundredors were required on a plea of land between common persons, and 27 Eliz. c. 6, § 5 (1585), reduced the number to two in personal actions.

CO. LITT. (first published in 1628, 14th ed. by Hargrave, 1791) 125 (a), stated that the jury should come from the town, parish, or hamlet wherein the fact is alleged, but he admits, *id.* at 157, that in some cases jurors may come *de corpore comitatus*. *Cf.* also Braddish v. Bishop, Cro. Eliz. 260, 78 Eng. Rep. 516 (1592); Ware v. Boydel, 3 N. & S. 148, 105 Eng. Rep. 566 (1814); Amory v. Brodrick, 5 Barn. & Ald. 712, 106 Eng. Rep. 1822).

4 & 5 Ann., c. 16, § 6 (1705), enacted that the want of hundredors should not be a cause of challenge to a jury, and that they might come from the body of the county in which the issue was triable. *Cf. infra* note 210.

⁴³ Every allegation in the pleadings upon which issue could be taken, *i.e.*, every material and traversable allegation, should state the place at which the alleged fact happened. Besides this venue in the body of the declaration (or in a subsequent pleading), "fact venue," a venue "in the action" had also to be laid in the margin of the declaration, at its commencement. The old rules of venue are described in Scott v. Brest, 2 Term Rep. 238, 100 Eng. Rep. 129 (1788); Ilderton v. Ilderton, 2 H. Bl. 145, 161, 126 Eng. Rep. 476, 485 (1793); King v. Burdett, 4 B. & Ald. 175, 176, 106 Eng. Rep. 873, 874 (1820).

⁴⁴ *Cf.* Mich. 42 Edw. III, Rot. 45, *coram rege* (1369), *supra* note 34, where the court of the King's Bench held: "Et quia negotium praedict. in curia hic terminari non potest, eo quod juratores insulae praedict. coram justitiariis hic venire non possunt, nec de jure debent. . . ." (Italics supplied.) *Cf. also infra* note 154.

Cf. also Y. B., 48 Edw. III, 30, 17 (1374), *per* Belknap, C.J.: "In an assize in a county, if the court does not see six or at least five men of the hundred where the tenelements are, to inform the others who are further away, I say that the assize will not be taken. *A multo fortiori*, those of one county cannot try a thing which is in another county." *Cf.* THAYER, *PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW* (1895) 91.

Cf. Ilderton v. Ilderton, 2 H. Bl. 145, 159, 126 Eng. Rep. 476, 484 (1793): "... a jury of one county could not try any matter arising within another county, and a foreign county was almost as formidable a thing in point of jurisdiction to try as a foreign country."

⁴⁵ 6 Rich. II, c. 2 (1383). Y. B., Pasch. 21 Edw. IV, pl. 19, fo. 26 (1482), debt brought in London on obligation in favor of Abbey of S. Albans in county of Hertford. It was held by the majority that the writ abated, because under 6 Rich. II, c. 2 (1383), *supra*, courts of London cannot take cognizance of an obligation dated in Hertford, and it was also said that if the place (date, etc.) be in the obligation, but did not appear in the writ where the Abbey is, "uncore le def. poit surmitte p. plee q l'Abbey est en aut county." Cf., as to this, *infra* text to note 199. Genney seems to have dissented on the ground that "l'obl. poit estre fait p authority del Covet. en aut County."

⁴⁶ 4 Hen. IV, c. 18 (1403).

⁴⁷ Court rules of 15 Eliz. (1573), and A.D. 1654, have made it highly penal for attorneys to transgress these statutes. Cf. *Santler v. Heard*, 2 W. Bl. 1031, 96 Eng. Rep. 605 (1775).

Cf. also *King v. Burdett*, 4 B. & Ald. 95, 171, 106 Eng. Rep. 873, 906 (1820), *per* Abbott, C.J.: "We find in many of our books, and even in the preamble of the Statute of the Second and Third Edward 6, c. 24 [1550], expressions importing that a jury of one county cannot inquire into, or take cognizance of any fact that happened in another . . . There was a time when it was supposed that a jury could not even in a civil action inquire into a matter that did not take place in their own county."

⁴⁸ LITTLETON, *TENURES*, lib. 3, 440, as in Co. Litt., 261 (b): "He that is out of the realm cannot have knowledge of the disseisin made unto him by understanding of the law, no more than that a thing done out of the realm may be tried within this realm by the oath of 12 men." Littleton's work (cf. Wambaugh's ed. in English, Wash. 1903) was written probably later than in 1475. Cf. GROSS, *SOURCES OF ENGLISH HISTORY* (1900) 317.

Cf., to the same effect: FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (written soon after 1450), c. 32 (Eng. transl., with notes of Selden, ed. 1775, at 103 *et seq.*); DOCTOR AND STUDENT, OR, *DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND* (1523-1530), lib. 2, c. 2 (18th ed. in English, 1815, by Muchall); SELDEN, *MARE CLAUSUM SEU DE DOMINIO MARIS* (written 1618, published 1635) c. 24 (1663 ed., at 391).

⁴⁹ Y. B., Hil. 48 Edw. III, pl. 6, fo. 2-3 (1375): contract of service (in France), "obligac. port date a Harflete en l'coute de Kent lou de rei veritat, il fuit fait en Normand'." Cf. also 1 BROOKE, *LA GRAUNDE ABRIDGEMENT* (1573 ed.), t. Faits, fo. 327 (b), pl. 95: "Home covent de server ove D.S. in le guerr in France per indentur que port date a Rone in France, & il counta pur son wages que le fait fuit fait al Rone in Kent, & bien . . . 48 E. 3, 2." Cf. also *ibid.*, t. Obligation, pl. 87.)

⁵⁰ Belknap suggested that the suit is "triabl' devat l'constable & Marschal" (cf. *infra* note 120), and he also said: "Pour vous deliverer no diom q il n'ad nul lieu des l'coute de Kent appell' Harflet." For similar fictitious allegations, cf. *infra* note 51, and, for the seventeenth century, note 215.

⁵¹ Y.B., 15 Edw. IV, pl. 18, fo. 14 (1476), contract of service in Calais. Two theories were put forward to retain jurisdiction. One was that Calais is in the county of Kent (cf. this case as reported in 2 BROOKE, *ABRIDGEMENT*, t. Trialles, fo. 302 (b), pl. 46: ". . . il plede q Calice est in com. Kent . . ."); said Genney (fo. 15): "Calleis n'est pas conus, car poit estre un Calcis en Kent, et auter Calcis en le Marches de Picardie" (cf. a similar suggestion in cases of the eighteenth century, *infra* note 229); said Catesby: "Dits que voilles, jeo die que Calcis est icy en le county de Kent." The other theory was that if it can be shown that during the time of the stipulated service in Calais he was in England,

this can be tried in England. Said Littleton: "Si jeo sue oblige a Genney, que jeo serveray a luy per un an en les parties de Normandie, si Genney port brief de Det sur obligation, et jeo die q jeo serve a luy per un an en Normandie, etc. le plaintiff dirra que jeo sue cie en Engleterre mesme l'an ou part del an, en un certain lieu, et si soit trove q jeo sue icy en Engleterre mesme l'an, adonques jeo n'avoy performe la condition, et issint le plaint recovers, uncore le performance del condition serroit fait hors del Roialme." Cf. notes 164 and 167 *infra*.

In *Protector v. Ashfield*, Hardress 64, 145 Eng. Rep. 381 (1656) it is said, with reference to 15 Edw. IV, 14 (1476), *supra* this note, and 10 Hen. VI, 14 (1432), *supra* note 37, that "if in debt or trespass a matter arising beyond sea be in issue, the trial shall be here, because else the matter in question would fail of a trial."

In *Ward's Case*, Latch. 3, 82 Eng. Rep. 244 (1625-1628), it is said, with reference to 21 Edw. IV, 26 (1482), that "si un obligation port date al Antwerpe, ou Callis Sands, sera intend destre del ceux taverns en London et nemy des ceux lieux ouster le mere." Y. B., Pasch. 21 Edw. IV, pl. 19, fo. 26, *supra* note 45, does not warrant, however, the statement above.

In Y. B., Pasch. 20 Hen. VI, pl. 21, fo. 28 (1442), an action was brought in the Common Bench on a contract made in Paris, France. Markham, the counsel, though he pleaded that no action lay on such a contract in England, did not "dare" to demur on this point: "Portington vult av' demurr: Markham n'osa mes pria cong. denple." Newton said: "Mesque l'obligation se fist en France, uncore si suit en Engleterre action peut estre maintenir sur ceo cyeine assez bien." Cf. also *infra* note 151.

In Y. B., Hil. 32 Hen. VI, pl. 13, fo. 25, at fo. 26 (1454), Fortescue seems to have expressed an opinion similar to that of Newton in 20 Hen. VI, *supra* this note: "... si home plede tiel en Normandy, ou en France, ou Duchland, si soit ple ou auterment, sera trie ou le brief est porte; ..." Cf. *infra* note 67.

⁵² Cf. Y. B., Mich. 20 Edw. III (1347), Rolls Series (1911) no. 3, 168-171, also in FITZHERBERT'S ABRIDGEMENT (1565), t. Averment, fo. 129 (b), pl. 34; death of one of the vouchers alleged at a castle "en breteign," jury trial was granted. Cf. also Ass. 29 Edw. III, pl. 11, fo. 158 (b) (1356). Cf. also FITZHERBERT, NEW NATURA BREVIVM (1534, 9th ed. 1794) *196, writ of assise of Mortdauncestor: "if a man go beyond the sea in pilgrimage, and die there, his heir shall have a writ of mortdaunc . . . and in that writ it sufficeth, if he were seized the day he left the land, and embarked although it was not the day of his death."

⁵³ Cf. Y. B., Hil. 32 Hen. VI, pl. 13, fo. 26, (a) and (b) (1454), where it was said that if the defendant allege that the plaintiff is a Scot born at St. Johns, Town in Scotland, out of the Legiance, this is a trial where the writ is brought, but if the plaintiff will reply, that he was born at London within the Allegiance the defendant must be rejoin, that the plaintiff was born at St. Johns Town in Scotland, without that, that he was born in London, and the issue shall be tried in London. Cf. also Y. B., Hil. 7 Hen. VII, fo. 8 (b) (1492), where Hussey said: "... in le cas si on voill alleg encontre un homme que il est alien, et ne et ingendre in auter pais, c ser trie icy, mes le def. viendra eins, et mrrera q il fuit ne deins Anglet.; et de c tantum le visne viend, ou il fuit ne a tiel lieu ou nemy . . ."

Cf. also Y. B., 14 Edw. IV, 14 (1476), 2 BROOKE, ABRIDGEMENT, t. Trialles, fo. 302 (b), pl. 46: "... si soyt trove p office q J. N. est alien nee extra allegiance Regis et ad purchas tiel terr. J. N. poet dire q il fuit nee a tiel lieu in Engl. enter tiel & tiel son pere & mere, et hoc serra trye in le com. ou le nestre est allege."

Cf. also Y. B., Hil. 19 Edw. IV, pl. 4, fo. 6 (1480), also in BROOKE'S ABRIDGEMENT, Trialles, fo. 303 (a), pl. 105, also Viner's ABRIDGEMENT, Alien, 271—debt upon obligation—defendant says plaintiff was born in Denmark, plaintiff says he was born in Diocese of York; defendant traverses *absque hoc* born in York; writ issued to inquire of his birth there.

⁵⁴ *Cf.* Calvin's case, 7 Co. Rep. 26 (b), 27 (a), 77 Eng. Rep. 409 (1609): "If the demandant or plaintiff in any action concerning lands be born in Ireland, Guernsey, Jersey &c., out of the realm of England, if the tenant or defendant plead, that he was born out of the ligeance of the king, the demandant or plaintiff may reply, that he was born under ligeance of the King at such place within England, and upon the evidence the *place shall not be material*, but only the issue shall be, whether the demandant or plaintiff were born under the ligeance of the King in any of his kingdoms or dominions whatsoever: and in that case the jury may find the special matter, viz. the place where he was born, and leave it to the judgment of the court." (Italics supplied.)

Cf. also Co. Litt. 261 (b): "If an alien (for example borne in France) bring a reall action and the tenant plead that the demandant is an alien borne under the obedience of the French king, and out of the leageance of the king of England; shall this case want trial, because the matter alleaged is out of the realme? then by the fiction of this pleas, no demandant shall recover; therefore in this case, the demandant shall reply, that hee was borne at such a place in England, within the King's leigiance, and hereupon a jury of 12 shall be charged, and if they have sufficient evidence that hee was borne in France, or in any other place out of the realme, then shall they finde that hee was borne out of the king's alleageance, and if they have sufficient evidence, that he was borne in England, or Ireland, or elsewhere within the king's obedience, they shall finde that he was borne within the king's leigiance. And this hath ever beene the pleading and manner of triall in that case." (Italics supplied.) This is part of the comment on Littleton's statement, *supra* note 48, "that a thing done out of the realme may [not] be tried within this realme by the oath of 12 men."

⁵⁵ 25 Edw. III, stat. 5, c. 2 (1350). *Cf.* Rex v. Casement, [1917] 1 K. B. 98. Also 4 Hen. VII, c. 24 (1489), and 23 Hen. VIII, c. 33 (1539).

⁵⁶ 35 Hen. VIII, c. 2 (1541). *Cf.* Rex v. Lynch, [1903] 1 K. B. 444.

⁵⁷ Originally treasons (abroad) were tried in the county where the land of the accused was *Cf.* 5 Rich. II, P. (1382), FITZHERBERT, ABRIDGEMENT, t. Trialles, fo. 154, pl. 54, where it is said: "si home soit adherent as enemys le roy en France sa terre est forfeitable la adherauns serr tric lou sa tre est come ad este tonetfoitz fait des adherauntz as enemiez le roy en Escoce." *Cf.* also Carter and Crost's case, Godbolt 33, 78 Eng. Rep. 21 (1585); Calvin's Case, 7 Co. Rep. 27 (a), 77 Eng. Rep. 409 (1607).

Co. Litt. 262 (a): "The statute of 25 E. 3 [1350, *supra* note 55] *de prodicionibus* doth declare, that it is treason by the common law to adhere to the enemies of the king within the realme, or without, if hee bee thereof proveablement attaint of overt fact, and that he shall forfeit all his lands, &c. . . for necessitie sake, the adherencie without the realme must be alleaged in some place within England. And if upon evidence they shall finde any adherencie out of the realme, they shall finde the delinquent guilty. But most commonly they indited him (if he had lands in some county) where his lands did lie, that were to be forfeited and this, as appereth in our bookes, was the common use. And so it is declared by the statute of 35 H. 8 [*supra* note 56] and that it shall be tried by twelve men of the countie, where the kings bench shall sit, and be

determined before the justices of that bench, or else before such Commissioners, and in such shire of the realme, as shall be assigned by the king's majestie's commission. . . ."

5 Rich. II, P. (1382), FITZHERBERT, ABRIDGEMENT, t. Trialles, fo. 154, pl. 54, also Godb. 33, 78 Eng. Rep. 21 *quare impedit* by the King against clerk of church in Bishopric of Durham; bishop, who is dead, presented his clerk, clerk died, chapter collated a cardinal, who for miscreancy and schism was deprived, temporalities being in the King's hands. It was objected that "mescreanz dun Cardinal al court de Rome . . . nest triable cieing," but it was held *respondes ouster*. It was said that all spiritual courts are but one court, and it was decided (*cf. supra* cases of treason abroad tried in England where the land of the defendant was), that the case above "siera tric ou lesglise fuit."

Cf. also the following cases, involving matters in England: Ass., 35 Edw. III (1362), BROOKE, ABRIDGEMENT, t. Certificate d' Evesque, pl. 14, tenant pleaded bastardy in demandant, who said he was born in another diocese and prayed a writ to bishop of that diocese to certify, but the writ was awarded to bishop of the diocese where the action was brought; that is, where the lands lay; Ass., 38 Edw. III (1365), pl. 30, fo. 231, assize of novel disseisin of lands in the diocese of Winchester, plea of bastardy set up, but marriage alleged to have been had in London, writ to certify was awarded to bishop of Winchester, not to bishop of London; Y. B., 7 Hen. V (1420), BROOKE, ABRIDGEMENT, t. Trialles, pl. 21, bastardy pleaded, marriage replied in County of S., writ awarded to bishop of E. where the lands were.

⁵⁸ Murder or manslaughter: 9 Geo. IV, c. § 7 (1827); R. v. Helsham, 4 Car. & P. 394, 172 Eng. Rep. 754 (1830); murder and manslaughter on the land: 24 & 25 Vict., c. 100, § 9 (1861); bigamy: 24 & 25 Vict., c. 100, § 57 (1861); Earl Russell's case, [1901] A.C. 446. Also offenses under the Slave Trading Act, 4 Geo. IV, c. 113, §§ 9, 10 (1824).

Cf. Le Roy v. Indicalmois, 1 Sid. 143, 82 Eng. Rep. 1021 (1664), arrest in England, upon complaint of the Portuguese Ambassador to the Council, of one who came from Brazil with merchandise without having paid customs.

THE HABEAS CORPUS ACT, 31 Charl. II, c. 2, § 1 (1680), provided that no subject of the realm shall be sent as prisoner to any foreign part, but if a subject has committed any capital offense in Scotland or Ireland, or any of the islands or foreign plantations of the king, he may be sent to be tried in such place.

In the case of Colonel Lundy, 2 Vent. 314, 86 Eng. Rep. 460 (1691), who had been appointed governor of Londonderry in Ireland and had endeavored to betray, afterwards escaping to Scotland where he was taken and brought prisoner to England, the Judges, in a memorandum to the king and Council, declared their opinion to be that he might be sent to Ireland to be tried there. Another case of extradition to Ireland, *Rex v. Kimberley*, 2 Strange 848, 93 Eng. Rep. 890 (1730).

⁵⁹ 28 Hen. VIII, c. 15 (1536).

⁶⁰ 32 Hen. VIII, c. 3 (1540). *Cf.* also 33 Hen. VIII, c. 23 (1541).

⁶¹ *Cf.* 3 Co. INST. 112, and for details, Sack, *Doctrine of Quasi-Territoriality of Vessels and Admiralty Jurisdiction over Crimes Committed on Board National Vessels* (1935) 12 N. Y. U. LAW QUARTERLY REV. 628, note 16.

⁶² *Dowdale's Case*, 6 Co. Rep. 46 (b), also *Richardson v. Dowdale*, Cro. Jac. 55, 79 Eng. Rep. 47 (1605); Roll. 403, 81 Eng. Rep. 566.

Cf. already *Carter and Crost's Case*, Godb. 33, 78 Eng. Rep. 21 (1585), action of detinue by Carter against Crost—plaintiff declared his brother was possessed of the

property and died intestate, bishop of Cork granted to plaintiff letters of administration, property came to defendant by trover, and declared also that he was, as administrator thereof, possessed in London. It was held that an administrator made by a bishop of Ireland might not bring an action in England as administrator, "because the letters of the administration granted in Ireland, there could be no trial here in England"; that, nevertheless, an administrator might count of his own possession, although he was never possessed, if the intestate at the time of his death were possessed, "for of transitory things, the law casts upon him a sufficient possession to maintain an action possessory"; and that jury may find a "forrain" matter, and this "shall not abate the writ, if it be not matter of substance, and pleaded before: but here the finding of the letters of administration is more than they had in issue." Judgment was given for plaintiff, "for the substance in this case was the possession and not the administration for he might have an action of his possession without showing the letters of administration."

⁶³ Richardson v. Dowdale, Cro. Jac. 55, 79 Eng. Rep. 47.

⁶⁴ 6 Co. Rep. 46 b.

⁶⁵ Cf. Protector v. Ashfield, Hardres 64, 145 Eng. Rep. 381 (1656).

⁶⁶ Y. B., Mich. 45 Edw. III (1372), FITZHERBERT, ABRIDGEMENT, t. Visne, 181 (b), pl. 50: "Det port sur oblig. port date a Durham ou le briefe le roy ne court, et pour ceo que lobligh. fuit dedit le fait serra trie par gentz del p'chein counte, et pl. fuit fait al vic. de sc. que est prochein counte &c." (Italics supplied.)

Cf. also Ass., 8 Edw. III, pl. 27, fo. 17 (b) (1335), deed bearing date in county of Chester, "ou le bre le Roy ne court"; where it was said that it "serra trie ou le brief est port."

Cf. also The King v. Amery, Term Rep. 363, 99 Eng. Rep. 1141 (1786).

⁶⁷ Y. B., Hil. 32 Hen. VI, pl. 13, fos. 25 (b), 26 (a) (1454), *supra* note 51. This was debt upon bond made in the bishopric of Durham, "que est countie paleis et le brief le Roy ne court."

⁶⁸ Y. B., Mich. 19 Hen. VI, 12 b, pl. 31 (1441), FITZHERBERT, ABRIDGEMENT (1565), t. Trialles, fo. 150 (b), pl. 4.

⁶⁹ 26 Hen. VIII, c. 6 (1535). Cf. also King v. Morris, 1 Mod. 68, 86 Eng. Rep. 736 (1671); Rex v. Athee, 1 Strange 553, 93 Eng. Rep. 694 (1723).

⁷⁰ Barnwell v. Rochford (also Ratchford) (1544), 2 ROLLE, ABRIDGEMENT, t. Trial, fo. 597, pl. 8: writ of error was brought to reverse a judgment given in Ireland; error in fact was assigned and tried in Shropshire, county of Salop (alleged to be next county to Ireland).

⁷¹ Shepardson v. Chambers (1599), quoted in Crispe v. the Mayor of Berwick, 2 Keble 391, 81 Eng. Rep. 245; Sir T. Raym. 173, 83 Eng. Rep. 91; 1 Lev. 252, 83 Eng. Rep. 393; 1 Ventris 59, 86 Eng. Rep. 42; 1 Mod. 36, 86 Eng. Rep. 413; 1 Sid. 381, 462, 82 Eng. Rep. 1170, 1218 (1669-1670).

⁷² Cf. Crispe Case, *supra* note 71, 2 Keble 602, 84 Eng. Rep. 379: "... per Curiam ... Barwick being part of England ... is so of Wales on the same grounds ... , yet trial may be in the next county, so wherever foreign parts are within the jurisdiction of the Kingdom, and so this court can award execution ..."

⁷³ Cf. Y. B., Hil. 32 Hen. VI, pl. 13, fo. 26 (1454), *supra* note 67, per Fortescue. Wales was conquered by Edward I and annexed to England *jure proprietatis* by the statute of Ruthland, 12 Edw. I, st. 1 (1284); by 27 Hen. VIII, c. 26 (1535), and 34 and 35 Hen. VIII, c. 26 (1543), dominion of Wales was united for ever to the kingdom of England, and it was ordered that the laws of England and no other should be used in

Wales; *cf.* 2 HALE, H. C. L. 18 *et seq.*, 30 *et seq.* The conquest of Ireland began in the twelfth century, but was not completed until the seventeenth century; Henry VIII assumed the title of King of Ireland in 33 Hen. (1542), which was recognized by 35 Hen. VIII, c. 3 (1544); the common law of England was made the rule of justice in Ireland; *cf.* CRAW v. RAMSEY, Vaughan 293, 124 Eng. Rep. 1081 (1670). As to Berwick's being governed by laws of England and held of England, *cf.* Crispe Case, *supra* note 71, and 2 HALE, H. C. L. 28 *et seq.*

⁷⁴ For counties palatine, *cf.* the case of 1372, *supra* note 66. For Wales *cf.* Lampley v. Thomas, 1 Wils. 193, 95 Eng. Rep. 568; Penry v. Jones, 1 Dougl. 213, 99 Eng. Rep. 139 (1779); as to whether final process (*fieri facias*) on judgments in the King's Bench runs into Wales, *cf.* Draper v. Blancy, 2 Wms. Saund. 193, 85 Eng. Rep. 959; Sir T. Raym, 206, 83 Eng. Rep. 412 (1671); also Whitrong v. Blancy, 2 Mod. 10, 86 Eng. Rep. 912 (1675), holding that it does; *cf.* also the dissenting argument by Vaughan, C. J., "Concerning Process out of the courts of Westminster into Wales of Late Times, and How Anciently," Vaughan 395, 124 Eng. Rep. 1193 (1674). *Cf.* The King v. Johnson, 6 East. 583, 102 Eng. Rep. 1412 (1805), *per* Lord Ellenborough, C. J., at 600, 1419: "... Lord Vaughan ... was a very strong Welchman, as appears through his arguments ... yet it never was delivered, though intended to be so."

Stat. 13 Geo. III, c. 51 (1773), seems to recognize the jurisdiction of the courts of record out of Wales to hold plea, and issue mesne process, against parties resident in Wales.

⁷⁵ *Cf.* "Concerning Process into Wales" *etc.*, *supra* note 74, Vaughan 395, 403, 124 Eng. Rep. 1113, 1134: the rule that "the summons of inhabitants in Wales, and the tryal of an issue there arising, should be by the sheriff of, and in the next adjoining county, was first ordained by Parliament, though the Act be not extant now," citing three old cases of the thirteenth and fourteenth centuries to show the special causes that originated such practice.

By 26 Hen. VIII, c. 6, (1535), *supra* note 69, § 6, process from the adjoining shire could be issued into the Marches.

⁷⁶ *Cf.* also Crispe Case, *supra* note 71—demise in York of a house in Berwick, action of covenant against the corporation of Berwick (that stranger entered and kept plaintiff out of possession)—defendant pleaded said stranger did not enter, on which issue was joined; then plaintiff prayed *venire* from Belford in Northumberland, as next vill to Berwick, which was awarded and upon trial verdict was for plaintiff; it was moved, in arrest of judgment, that the *venire* should have been de *vicineto* of castle of York, where covenant bore date and the action was brought, (Sir T. Raym. 173); held, trial was "well enough" (1 Ventris 90).

⁷⁷ *Cf.* "Concerning Process into Wales," *supra* note 74, Vaughan 395, 404, 124 Eng. Rep. 1134: "... if the law [meaning the Common Law] had been, that an issue arising out of the jurisdiction of the Courts of England, that should be tryed in that county of England next to the place where the issue did arise: not only any issue arising in any of the dominions of England out of the realm, might be tryed in England by that rule, but any issue arising in any foreign parts, as France, Holland, Scotland, or elsewhere, that were not of the dominions of England, might, *pari ratione*, be tryed in the county next adjoining, whereof there is no vestigium for the one or the other, nor sorts it in any way with the rule of the law." *Cf.* also *infra* text to note 171.

⁷⁸ LITTLETON, TENURES (written after 1475), § 148: "An alien, which is bourne out of the liegance of our soveraigne lord the king, if such alien will sue an action reall

or personal, the tenant or defendant may say, that he was born in such a country, which is out of the King's allegiance, and ask judgment if he shall be answered." Quoted from Co. Litt. 129 (b).

In Y. B., Hil. 32 Henry VI, fo. 23, pl. 5 (1454), it was held that if an alien possessed the king's license and a safe conduct he could bring trespass against one who had broken into his house. Cf. Viner, Abridgment, t. Alien, 275, (8). In Y. B., Hil. 19 Edw. IV, pl. 4 (1480), it was assumed that an alien friend could maintain an action of debt on a covenant. 38 Hen. VIII (1547) is reported as having held that an alien may bring a personal action, cf. Brooke, Abridgment, t. Denizen, pl. 10, t. Nonability, pl. 40; Brook, New Cases 13, 73 Eng. Rep. 852; also Viner, Abridgment, t. Alien, 272. Cf. also Tirlot v. Morris, Bulst. 134, 80 Eng. Rep. 828 (1613), also *sub nom.* Tuerloote v. Morrison, Yelv. 198, 80 Eng. Rep. 130, action, by alien merchant, for words; upheld. Cf. also Pisany v. Lawson, 6 Bingham (N. C.) 90, 130 Eng. Rep. 1214 (1839).

Collingwood v. Pace, 1 Vent. 413, 86 Eng. Rep. 262 (1664), held, that an alien could take land by purchase (and hold until inquest of office found), but not by descent. This disability was abolished only by 33 & 34 Vict. c. 14 (1870).

⁷⁰ Edw. II (1307-1327), *cor. reg. Plac. in Dom. Cap. Westminster*, 321, cf. Maitland, SELECT PLEAS IN MANORIAL COURTS, (2 Selden Soc.) 132.

⁸⁰ 12 Edw. III (1338), 3 HALL, SELECT CASES, LAW MERCHANT (49 Selden Soc.) 157 (b) *et seq.*

⁸¹ 2 SEL. PLEAS ADMIR. XLIII, n.

⁸² *Supra* note 79.

⁸³ "... et praedictus Simon dicit quod lex mercatoria talis est in omnibus et singulis nudinis per totum regnum, Paratis est verificare." His opponent denied this, and therefore the sheriffs were directed to produce before the king twelve merchants to recognize, etc.

⁸⁴ 27 Edw. III, st. 2, c. 13 (1353): "soit receu de prover les ditz biens estre les siens par ses marches ou par sa carte ou coket ou par bons et loialx marchantz privez ou estrangers et par tiels prooves soient meismes les biens delivres au marchant saunz autre seute faire a la coe lei."

⁸⁵ 31 Hen. VI, c. 4 (1453), confirmed by 14 Edw. IV, c. 4 (1474).

⁸⁶ Y. B., Pasc. 13 Edw. IV, pl. 5, fo. 9 (1474); emended text in 2 SEL. CASES, LAW MERCHANT, LXXXV.

⁸⁷ See POLLOCK & WRIGHT, POSSESSION 134; BLACKBURN, SALE (2d ed.) 317.

⁸⁸ "Le Chancellor. C'est suit est pris par un merchant alien, que est venus par safe conduit icy, et il nest tenu de suer selonques le ley del terre, a tariet le trial de xii homes, et autres solempnities del ley de terre, mes doit suer icy, et sera determine selonques le ley de nature en le Chancery, et il doit suer la de heur en heur et de jour [en jour] pour le spede de merchants . . . Et comment que ils sont venus deyns le royaume, pource le Roy ad jurisdiction d'eux de mettre, d'estoyer al droit, etc., mes ceo sera secundum legem naturae que est appell par ascuns ley Marchant, que est ley universal par tout le monde."

To the same effect cf. 2 Rich. III, 12 (1485), Tenk. 164, 145 Eng. Rep. 106.

Cf. Godfrey & Dixon Case, 2 Rolle 93, 94, 81 Eng. Rep. 680, 681 (1620), also in Palmer 13, 81 Eng. Rep. 935, saying that aliens in England, being subject to the law merchant, "pur ceo quant al personal biens nostre ley est plus favourable al aliens que le ley de aucun autre country ou nation . . ."

By 32 Hen. VIII, c. 16, § 9 (1541), it was enacted, "that every alien and stranger

born out of the King's obeisance, not being denizen, which now or hereafter shall come in or to this realm or elsewhere within the King's dominions, shall, after the 1st of September next coming, be bounden by and unto the laws and statutes of this realm, and to all and singular the contents of the same." *Cf.* *Caldwell v. Van Vlissingen*, 9 Hare 415 (1851).

⁸⁹ *Cf.* BAILDON, *SELECT CASES IN CHANCERY* (10 Selden Soc.) XLII *et seq.* *Cf.* also 2 Rich. III, 12 (1485), *supra* note 88. The chancellor had jurisdiction in all cases in which the Crown was concerned, *cf.* Spence, *The Court of Chancery*, 2 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* (1908) 235, and his decisions were made to accord with "equity, *jus gentium*, and the laws of other nations." *Cf.* also Scrutton, *Roman Law Influence*, etc., 1 *id.* (1907) at 215.

⁹⁰ *Cf.* Y. B., Pasch. 13 Edw. IV, pl. 5, fo. 9 (1474), *supra* note 86.

⁹¹ *Cf.* LEADAM & BALDWIN, *SELECT CASES BEFORE THE KING'S COUNCIL* (35 Selden Soc.) xxvii-xxviii, and cases: *Cosfeld v. Leveys* (1322), LXX, 32; *Lombards v. Mercers* (1359), lxxvi, 42; *Petition of the Hansards* (1389), xcvi, 76. The Council was often sending cases to other courts, *id.* at XVIII. *Cf.* also following note.

⁹² In 1384, Cor. Reg. Hil. 8 Rich. II, rot. 18, Gonsales, a Portuguese merchant, filed a bill before the chancellor, complaining of the spoiling of his ship in Southampton harbor; issue being joined, it was sent to be tried before the justices of the King's Bench, with a jury of merchants and others, of whom half were foreign and half were English. *Cf.* 1 MARSDEN, *SELECT PLEAS IN ADMIRALTY* (6 Selden Soc.) XLVIII-XLIX.

⁹³ *Cf.* *supra* notes 88, 89. *Cf.* also STATUTE OF THE STAPLE, 27 Edw. III, st. 2, c. 20 (1353): "... because we have taken all merchant strangers in our said realm and land into our special protection, and moreover granted to do them speedy remedy of their grievances if any be to them done, we have ordained and established, that if any outrage or grievance be done to them in the country out of the staple, the justices of the place where such outrages shall be done shall do speedy justice to them after the law merchant from day to day and from hour to hour, without sparing any man or to drive them to sue at the common law." *Cf.* also *infra* notes 103, 104.

⁹⁴ *Cf.* *supra* notes 79, 83, 92. *Cf.* also John Doyson, merchant of Gascony v. Peter Ternagen, 19 Edw. II (1326), 3 SEL. CASES LAW MERCHANT 49—suit upon a recognition before the Barons of Exchequer—defendant said he paid to John, and proffered a letter of acquittance, the date of which was at Horham: "and precept is made to the sheriff that he make to come 12 etc. of the vicinity of Horham, and from the nearer vicinity where foreign merchants dwell, namely six merchants of the Duchy of Aquitaine and other alien merchants and six of other good and lawful men, by whom, etc."

⁹⁵ *Cf.* Brodhurst, *The Merchants of the Staple* (1901) 17 L. Q. REV. 56 *et seq.*, also in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* (1909) 16 *et seq.*; Carter, *The Early History of the Law Merchant in England* (1901) 17 L. Q. REV. 232 *et seq.*; Burdick, *What Is the Law Merchant* (1902) 2 COL. L. REV. 470 *et seq.*, also in 3 SEL. ESS. 34 *et seq.*; MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* (1904); SANBORN, *ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW* (1930). *Cf.* also MORRIS, *SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY (1674-1784)* (1935), introd. 1-13.

Cf. also CUNNINGHAM, *THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE* (1896); SALZMAN, *ENGLISH TRADE IN THE MIDDLE AGES* (1931); BEARDWOOD, *ALIEN MERCHANTS IN ENGLAND, 1350 TO 1377, THEIR LEGAL AND ECONOMIC POSITION* (1931).

⁹⁶ 31 Edw. I (1303), 2 MUNIMENTA GILDHALLAE (Rolls Series), pt. 1, 205-211.

⁹⁷ 27 Edw. III, st. 2 (1353). Cf. 3 SEL. CASES LAW MERCHANT LXXX *et seq.* The business of the courts of the staple was taken over in the sixteenth and early seventeenth centuries by the Council (whose jurisdiction ended in 1640), and by the admiralty.

⁹⁸ 27 Edw. III, st. 2, c. 2 (1353).

⁹⁹ Co. 4 INST. 272, explains the term "pie powder" ("piepoudres," "pede pulverosi") as meaning that justice was administered in these courts as speedily as the dust falls from the foot. Cf. also 3 BL. COMM. *33-34. The other explanation is that these courts ("Curia pedis pulverisati") were frequented by chapmen or pedlars (in old French "pieds puldreaux") with dusty feet, who wandered from mart to mart. Cf. 1 SEL. CASES, LAW MERCHANT, by GROSS (23 Selden Soc.) XII *et seq.*; cf. also Jenk. 133, 145 Eng. Rep. 93.

These courts became obsolete in the seventeenth and eighteenth centuries, when the law merchant was "incorporated" into the common law. Cf. *infra* section V.

¹⁰⁰ Cf. Brown v. Goldsmith, 1 Brownl. & Golds. 175, 123 Eng. Rep. 738 (1616). Cf. also 1 ROLLE, ABRIDGMENT, t. Court, fo. 544, (30): "Al chescun faire de droit appertien on court de pipowders, 17 Ed. 4, cap. 2 [1477, *infra* note 107]."

Some of such courts were, however, held by custom or prescription in vills or boroughs. Cf. 13 Edw. IV, 8 (1474), Dyer 133, 73 Eng. Rep. 289; Pendred v. Chambers, Cro. Eliz. 256, 78 Eng. Rep. 512 (1591); Goodson v. Duffil, 2 Bulstr. 23, 80 Eng. Rep. 928 (1612).

¹⁰¹ Cf. 1 SEL. CASES LAW MERCHANT XXIV.

¹⁰² *Id.* at XXI, XXIV, XXXIV.

¹⁰³ STATUTE OF THE STAPLE (1353), *supra* note 98, c. 8, provided "that all merchants coming to the staple shall be ruled by the law merchant of all things touching the staple, and not by the Common law of the land, nor by the usage of cities, boroughs, or other towns"; c. 19, section 2, promised speedy justice to merchants "from day to day, and from hour to hour, according to the law used in such staples before this time holden at all times"; c. 21 required the mayor of the staple to have "knowledge of the law merchant" and "to do right to every man after the law aforesaid." According to c. 8, foreign merchants might, if they so preferred, sue in the common-law courts and have the law of the land instead of the law merchant applied.

¹⁰⁴ Cf. 1 SEL. CASES LAW MERCHANT 25, 65, 86, 91, *et passim*; 2 BATESON, BOROUGH CUSTOMS (21 Selden Soc.) 187 *et seq.*

¹⁰⁵ Cf. STATUTE OF THE STAPLE (1353), c. 8, *supra* note 103, and c. 20, *supra* note 93.

ZOUCHER, JURISDICTION OF THE ADMIRALTY OF ENGLAND ASSERTED (in MALYNES, LAW MERCHANT, 1686 ed.) 105, reports that these courts heard all manner of contracts between merchants whether made within the staple or without.

Cf. 2 SEL. PLEAS ADMIR. XLIII, Pilk v. Venore (1349), maritime case (liability of shipmaster for loss of cargo by theft of crew), in the court of Bristol, removed into chancery upon the ground that trespass was committed on the high seas.

¹⁰⁶ Cf. 1 SEL. CASES LAW MERCHANT XXIV.

¹⁰⁷ 17 Edw. IV, c. 2 (1477), reciting that "divers persons coming to fairs are grievously vexed and troubled in the Court of Pie-powder by feigned actions, and also by actions of debt, trespass, feats, and contracts made and committed out of the time of the said fair or the jurisdiction of the same." The statute was slightly amended and made perpetual by 1 Rich. III, c. 6 (1483).

Cf. already Anon., Keilway 99, 72 Eng. Rep. 263 (1508), holding that the courts of

the market have jurisdiction "solement des matters accrues en temps de cest market dont les gents de cest market ferra le triel queux ont melieux notice de cest market. . . ." *Cf.* to the same effect *Hall v. Pyndar*, 2 Dyer 133 (a), 73 Eng. Rep. 289 (1556), holding that action will not lie in the pie-powder court of Sturbridge on a contract made at the preceding fair; *Howel v. Johns*, 1 Cro. Eliz. 773, 78 Eng. Rep. 1004 (1600), also *sub nom.* *Hall v. Jones*, Moore, K. B. 623, 72 Eng. Rep. 799, holding words spoken before the market not subject to the jurisdiction of the market court of the city of Gloucester; *cf.* also *Hodges v. Moyse*, Cro. Car. 46, 79 Eng. Rep. 644 (1626); *Anon.*, *Skinner* 33, 90 Eng. Rep. 17 (1694).

Goodson v. Duffield, Cro. Jac. 313, 79 Eng. Rep. 268 (1613), is reported as having decided that pie-powder courts held by custom (*cf. supra* note 100) may take cognizance of any causes done at any time, being transitory and personal. But from the report of this case in *Moore* (K. B.) 830, 72 Eng. Rep. 993, it appears that the action was upon an obligation made before the fair, and it was held that the pie-powder court in Rochester, being established by prescription, "poit tener plea des choses devant"; thus the only question decided was that of jurisdiction over a cause occurring at a time other than that of the fair, not of that over a cause occurring in a different place. *Cf.* also *Chambers v. Pert*, 2 Bulst. 23, 80 Eng. Rep. 928 (1591), holding maintainable by custom action of trespass for assault and battery done long before.

¹⁰⁸ *Cf.* Holdsworth, *The Early History of the Contract of Insurance* (1917), 17 COL. L. REV. 98 *et seq.*

¹⁰⁹ 43 Eliz. c. 12 (1601), reenacted and amended by 13 & 14 Charl. II, c. 23 (1662).

¹¹⁰ Jurisdiction of the court was construed to extend only to insurances on goods. The court was held to be open only to the insured, and its judgments could not be pleaded in bar to a subsequent action at law. *Cf.* *Delbye v. Proudfoot*, 1 Show. K. B. 396, 89 Eng. Rep. 662 (1693). The court "lapsed into disuse, and died of inaction within a century after its creation." VANCE, *INSURANCE LAW*, 3 SEL. ESSAYS 114.

¹¹¹ *Cf.* SEL. PLEAS ADMIR., Vol. I, XVI, vol. 2, XVIII, *et seq.*, LXVIII *et seq.*, 27 *et seq.*; MARSDEN, *LAW AND CUSTOM OF THE SEA* (Navy Records Soc.) 38, 111, *et seq.* *Cf.* also Clark, *The English Practice with regard to Reprisals by Private Persons* (1933) 27 AM. J. INT. L. 694 *et seq.*; Hindmarsh, *Self-Help in Time of Peace*, 26 *id.* at 315 *et seq.* Such reprisals ceased to be authorized only in the eighteenth century, Clark, *loc. cit.* 708.

¹¹² *Cf.* BILDON, SEL. CASES IN CHANCERY (10 Selden Soc.), cases nos. 23, 34, 42, 55; 1 SEL. PLEAS ADMIR. XVI.

¹¹³ Clark, *supra* note 111, at 699, 711.

¹¹⁴ Order of the Privy Council in 1637, 1 MARSDEN, *op. cit.* *supra* note 111, 502; Clark, *supra* note 111, at 710.

¹¹⁵ *Cf.* Phillip of Spicer of Gloucester v. Merchants of Bruges and Ypres (1261), and M. 9 Edw. I (1281), 2 SEL. CASES, LAW MERCHANT, lxxii; *Waynard v. Andrew Paping and Partners*, M. 3 Edw. II (1310), *ibid.* lxxv; *John Walran and other Merchants of Brabant v. Clement of Melton*, late bailiff of Stamford (fair), H. 6 Edw. II (1313), *ibid.* lxxvii; *Adam the Clerk of Lynn v. Merchants of the House of Almshouses of London*, 13 Edw. II (1320), *ibid.* lxxiv. *Cf.* also 34 Edw. I (1306), quoted in *Queen v. Keyn*, (1876) 2 Exch. Div. 63, 163. *Cf.* also 1 SEL. CASES LAW MERCHANT, 9 *et seq.*

¹¹⁶ FITZHERBERT, *NEW NATURA BREVIVM* (1534, 9th ed. 1794)* 114: "If an English merchant be robbed and his goods be taken from him, beyond seas, by merchant strangers, and the English merchant sue beyond sea to have justice and restitution made

therefor, and cannot obtain it, and this matter be testified unto the King in his chancery by divers credible persons, now, upon this testimony, if the merchant strangers come unto any place within the realm of England with their goods, then the English merchant shall have a writ out of chancery directed unto the mayor or bailiffs, where such merchant strangers are with their goods, to arrest them and their goods, and to keep them under arrest until they have satisfied the party his damages, which he hath sustained by reason of their misdoing."

A substantially similar system of reprisals existed in England against persons from other English cities, cf. 2 BATESON, *BOROUGH CUSTOMS* (21 Selden Soc.) LIII *et seq.*; MAITLAND, *SELECT PLEAS OF MANORIAL COURTS* (2 Selden Soc.) 135. STATUTE OF WESTMINSTER I, c. 23 (1275), abolished them, but it did not touch aliens; MAITLAND, *ibid.* at 135.

¹¹⁷ Cf. *supra* note 115, cases of Merchants of Bruges and Ypres, Merchants of Brabant, Merchants of the House of Almain. Cf. also 1 SEL. CASES, *LAW MERCHANT*, 9-10.

25 Edw. III, st. 5, c. 23 (1351), and 27 Edw. III, st. 2, c. 17 and c. 19 (1353) declared that no letters of reprisal would be granted, except against the principals or sureties. But 4 Hen. V, st. 2 c. 7 (1416) again allowed grant of such letters in so far as treaties with other nations had not abolished their use.

¹¹⁸ FITZHERBERT, *NEW NATURA BREVIVM* (1534) *114, *supra* note 116: "but it seemeth that the English merchant shall not have such a writ, for any debt due to him by contract from a merchant stranger, upon a contract beyond the seas, if the merchant do come to England, or his goods—*Quare tamen thereof.*"

¹¹⁹ 11 Edw. I (1283), 2 SEL. PLEAS ADMIR. XLII, commission of oyer and terminer to two justices of the King's Bench to try a case of freight of wine brought from Gascony to Ipswich—"secundum legem mercatoriam." Cf. also Y. B., 12-13 Edw. III (1337-1338), (Rolls-Series 364-366).

In 1377, Pat. 50 Edw. III, 2d pt. m. 25 d., 1 SEL. PLEAS ADMIR. XLVIII, in a piracy case, some of the goods were brought to England, and the trial was at common law; the justices were directed to try the case: "secundum legem et consuetudinem regni nostri ac legem maritimam . . . intentionis tamen nostrae existit quod officio Admiralli colore praesentium nullo modo prejudicetur."

¹²⁰ Holdsworth, *Martial Law Historically Considered* (1909) 18 L. Q. REV. 117.

¹²¹ 13 Rich. II, st. 1, c. 2 (1390). Cf. text in LODGE & THORNTON, *ENGLISH CONSTITUTIONAL DOCUMENTS 1307-1485* (1935) 285: "Al constable appartient d'avoir conissance des contractz touchantz faitz darmes ou de guerre hors de roialme et auxint des choses qui touchent armes ou guerre deinz le roialme queux ne poent estre terminer ne discus par la commune ley." By a statute of 1399 criminal appeals concerning matters done outside the realm were to be determined by the court of Constable and Marshall. *Ibid.* 254, 286. In *Rex v. Hutchinson*, (1678) 3 Keble 785, 84 Eng. Rep. 1011, *habeas corpus* by defendant committed to Newgate on suspicion of murder in Portugal, which "being a fact out of the King's dominions" is triable by constable and marshall, and the court refused to bail him. Cf. *supra* note 58. On jurisdiction of the Constable and Marshall, cf. *Oldis v. Donmille*, 58 Eng. Rep. 40 (H. L. 1695).

¹²² Already 8 Rich. II, c. 5 (1384), had ordered that pleas at common law should not be entertained by the Constable and Marshall. Cf. also 1 Hen. IV, c. 14 (1399).

Cf. *Copyn v. Snake* (1394), *supra* note 37.

Cf. Y. B., Mich. 13 Hen. IV, pl. 10, fo. 4, (b) (1412), obligation bearing date in "Burdeaux, q est en Gascoigne," given to the plaintiff who paid to soldiers of the

defendants. The question was whether the case is determinable by the constable or at common law. It was suggested that it can be tried at common law: "vide stat. 1 H. 4, cap. 14."

¹²³ Co. 3 INST. *125; 1 BACON, ABRIDGMENT 603; Jenk, 97, 145 Eng. Rep. 69.

¹²⁴ Cf. CLERKE, PRAXIS SUPREMAE CURIAE ADMIRALITATIS (1667), c. 21: "Chacun contracte fait entre marchand et marchand ou marchand ou marinier outre la mer ou dedans le fode mark sera trie devant le Admiral et nenient ailleurs, per ordinance du Roy Edw. et ses seigneurs." Cf. De Lovio v. Boit, Fed. Cas. No. 3776, at 419 (C. C. D. Mass. 1815); "An author of undoubted credit," per Lord Hardwicke, in Sir Henry Blount's case, 1 Atkins 296, 26 Eng. Rep. 189 (1737).

¹²⁵ CLERKE, *op. cit. supra* note 124, at 143: "Soit enquis de tous ceulx qui se empledent aucuns marchand, marinier, ou autre homme quelconque a la commune ley dela terre appartenant a ley marine d'auncien droit. Soit enquis de tous juges qui tiennent devant ceulx aucuns plects appartenants par droiture a la Court de l'Admiraltie." Cf. De Lovio v. Boit, *ib.*

¹²⁶ In 1296-1297, the Court of Common Pleas claimed jurisdiction of torts and murders committed on the high seas, 1 SEL. PLEAS ADMIR. XVII-XVIII, denying that the admiral has jurisdiction in such cases. For cases of piracy tried at common law at the end of the thirteenth and the first half of the fourteenth centuries, cf. 1 SEL. PLEAS ADMIR. XV, XIX, XXV, XXXVI-XXXVIII. For a similar case in 1363, cf. Queen v. Keyn, [1876] 2 Exch. Div. 163, 167, *per* Cockburn, C. J. But in 1361 a commission of oyer and terminer, directing that a case of murder and robbery on the high seas should be tried by the common law, was recalled on the ground that it was triable "non coram iudiciariis nostris ad communem legem sed coram Admirallis nostris juxta legem maritimam." Cf. 1 SEL. PLEAS ADMIR. XLV.

¹²⁷ 1 MARSDEN, LAW AND CUSTOMS OF THE SEA (Navy Records Soc. 1915) XIV.

¹²⁸ 1 TWISS, BLACK BOOK OF THE ADMIRALTY (Rolls Series 1871) XXXIV and 68-69.

¹²⁹ 13 Rich. II, c. 5 (1389), entitled "What things the admiral and his deputy shall meddle," enacted that "forasmuch as a great and common clamour and complaints hath been oftentimes made before this time, and yet is, for that the admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office, in prejudice to our lord the king, and the common law of the realm, and in diminishing of divers franchises, and destruction and impoverishing of the common people, it is accorded and assented, that the admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea."

¹³⁰ 15 Rich. II, c. 3 (1391), entitled "In what places the admiral's jurisdiction doth lie," "declared, ordained and established, that of all manner of contracts, pleas, and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admiral's court shall have no manner of cognizance power nor jurisdiction, but all such manner of contracts, pleas, and quarrels, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed, and remedied by the laws of the land, and not before or by the admiral nor his lieutenant in anywise, nevertheless, of the death of a man, and of a maihem done in great ships, being and hovering in the main stream of rivers, only beneath the bridges of the same rivers, the admiral shall have cognizance."

¹³⁷ 2 Hen. IV. c. 11 (1400). Repealed by 24 Vict. c. 10, § 81 (1861).

¹³⁸ 1 SEL. PLEAS ADMIR. LXXX; 1 MARSDEN, LAW AND CUSTOM OF THE SEA (Navy Records Soc.) LI.

¹³⁹ *Id.* at 118.

¹⁴⁰ *Cf. f. ex.*, 2 SCHMOLLER, VOLKSWIRTSCHAFTSLEHRE (1919) 670 *et seq.*

¹⁴¹ 1 SEL. PLEAS ADMIR. LVIII: "audiendi et terminendi querelas omnium contractuum inter dominos proprietarios navium ac mercatores seu alios quoscunque cum eisdem dominis ac navium ceterorumque vasorum proprietariis pro aliquo per mare vel ultra mare expediendo contractuum omnium et singulorum contractuum ultra mare contractuum et in Anglia et ceterorum omnium quae ad officium Admirali tangunt . . . aliquibus statutis, actibus, ordinationibus sive restrictionibus in contrarium actis editis ordinatis sive provis non obstantibus." (Italics supplied.)

¹⁴² *Id.* at LIX. *Cf.* also De Lovio v. Boit, 7 Fed. Cas. No. 3776, at 436 (C. C. D. Mass. 1815).

¹⁴³ *Cf.* 1 SEL. PLEAS ADMIR. LXVIII, LXXIII. *Cf.* also Empringham's Case, 12 Co. Rep. 84, 77 Eng. Rep. 1361 (1611).

¹⁴⁴ 1 SEL. PLEAS ADMIR. LXX.

¹⁴⁵ 32 Hen. VIII, c. 14 (1540).

¹⁴⁶ 1 SEL. PLEAS ADMIR. LXVII.

¹⁴⁷ *Id.* at LXX. *Cf.* also De Ottranto v. Goods in the hands of Salvago, 2 *id.* at 13 (1550), where performance of a marriage contract debt between foreigners, entered into at Messina, was claimed and it was alleged that by civil law such debts have priority.

¹⁴⁸ *Cf. id.* at XIII, XVI, XXIX, XLIII. The civil law was also recognized in the admiralty, *cf.* Bridgeman's Case, 11 Jac. (1614) Hob. 11, 80 Eng. Rep. 162, *infra* note 184. Also HALE, H. C. L. *31-32; 3 BL. CO. *69.

¹⁴⁹ 25 Hen. VIII, c. 19, § 4 (1533).

¹⁵⁰ 1 SEL. PLEAS ADMIR. LXXIX. By 2 & 3 Will. IV, c. 22 (1832), and 3 & 4 Will. IV, c. 41 (1833), jurisdiction of the Delegates was transferred to the Council.

¹⁵¹ Holdsworth, *The Law Merchant*, 1 SEL. ESSAYS 308. In later times a judge of one of the common-law courts was associated with them. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 547.

¹⁵² The common-law courts vindicated their alleged jurisdiction by writs of prohibition to the admiralty, *cf.* lists of prohibitions in 1 SEL. PLEAS ADMIR. LXXIII-LXXVIII, and 2 *id.* at XLI-LVII. At first recourse was being taken to writs of *superseatas* and *certiorari* issuing from the chancery, but such applications to the chancellor often left admiralty with the disputed jurisdiction, *cf. id.* at XLI. The admiralty defended its jurisdiction with contempt proceedings against litigants who resorted to its rivals, 1 *id.* at LXVIII, 78.

¹⁵³ The queen's letter [said to have been written circa 1570, *cf.* Carter, *supra* note 95, (1901) 17 L. Q. REV. 244; 2 SEL. PLEAS ADMIR., XII, XIII] is extant, addressed to the mayor and sheriffs of London, in which she considers it "very strange" that they are taking on themselves to try cases on contracts arising upon and beyond the seas, which properly belong to "our Court of Admiralty," feigning the same to have been done within some parish or ward of London (*cf.*, as to that, *infra* note 217), and directs them to desist. In Burrell 232, 17 Eng. Rep. 550, such a letter is, however, dated 40 Eliz., May 16, 1598. "A letter in almost the same terms, dated 19th October 1604, was sent to the Lord Mayor and Sheriffs at the City of London by King James I. . .," *ibid. Ibid.* is printed a letter of July 8, 1584, from the Queen to the chief justice of England,

saying that "her Majesty's pleasure is . . . that your Lordship . . . have a special care . . . in al matters concerning the Admiraltie, that the same being triable by mere civil lawe be not admitted to triall before you at the common law, which of these marine and forraine causes is thought not soe properly and aptly to take knowledge . . ."

¹⁴⁸ "That the judge of the admiralty, according to such ancient order as hath been taken by King Edward I and his council [*cf. supra* note 124], and according to the letters patent of the lord high admiral for the time being, and allowed by other kings of the land ever since, and by custom time out of memory of man, may have and enjoy cognition of all contracts and other things, rising as well beyond as upon the sea without let or prohibition." *Cf. Zouche, supra* note 105, at 121-122; 2 SEL. PLEAS ADMIR. XIV.

COKE, 4 INST. 135, denied the existence of this agreement, and after 1606, when he became chief justice of the common pleas, the agreement was repudiated, 2 SEL. PLEAS ADMIR. XIV.

¹⁴⁹ Delabroche and Barney's case, 3 Leon. 232, 74 Eng. Rep. 653 (1588): Delabroche was sued in the admiralty court, upon obligation supposed to be made and delivered in France, and now he prayed a prohibition. "It was holden by the whole court, that such a bond might be sued here: but being begun in the Court of Admiralty, we cannot prohibit them, for that perhaps the witnesses of the plaintiff are beyond the sea, which may be examined there but not here."

¹⁵⁰ *Cf. also infra* note 177.

¹⁵¹ *Cf. Y. B., Pasch. 20 Hen. VI, pl. 21, fo. 28 (1442), supra* note 51—contract made in France—where Markham argued that the action should not be tried in England because the English law (which he assumed would have to be applied) would have changed the nature of the obligation: by Civil Law, which governs the obligation, proof that it was paid is admissible, whereas by English law such an obligation may be voided only by a specialty: ". . . la rais[on] e . . . car l'oblig. fait en Angleterre ne peut estre void p. a'vmet de paiement p nre ley, mes coviet estre void par especialte: mes l'oblig. en ceux pts fait est avoidable p. prves q il ad paye solonq la Ley Civil: donc e sra inconvenient de fair un obligatio q e voidable p prves dec de tiel force p l'acc. use cyeins, q change sa nature. . ."

ZOUCHE (+1660), JURISDICTION OF THE ADMIRALTY ASSERTED, (published in 1663, by Baldwin; also in supplement to *CONSuetudo vel Lex Mercatoria, or the ANCIENT LAW MERCHANT*, by MALYNES, 3d. ed. 1686, p. 89) states that Sir John Davis (on IMPOSITIONS, written about 1600, first published in 1656) affirmed "that both the Common Law and the Statute Laws of England take no notice of the Law Merchant, and do leave the Causes of Merchants to be decided by the ruler of that law, . . . which is part of the Law of Nature and of Nations," "whereby it is manifest [says Zouche] that the cases concerning merchants are not now to be decided by the peculiar and ordinary laws of every country, but by the general Laws of Nature and Nations. Sir J. Davis saith further, 'That until he understood the difference between the Law Merchant, and the Common Law of England, he did not a little marvel what should be the cause that in the Books of the Common Law of England there are to be found so few cases concerning merchants and ships, but now the reason was apparent, for that the common law did leave these cases to be ruled by another law, the Law Merchant, which is a branch of the Law of Nations.'"

¹⁵² *Cf. Zouche, supra* note 105, 103: "It may be thought reasonable that said contracts being grounded upon the Civil law, the law amongst Merchants, and other maritime

laws, the suits arising about the same should rather be determined in those Courts, where the proceedings and judgments are according to those laws, than in other Courts, which take no notice thereof."

¹⁵³ *Cf.* The *Ida*, Lush. 6, 8, 167 Eng. Rep. 3, 5 (1860), *per* Dr. Lushington: "Formerly the local limits of the admiralty jurisdiction were very doubtful, partly perhaps, because the distinction between jurisdiction given by the law maritime, and jurisdiction given by municipal law was not clearly apprehended."

¹⁵⁴ *Cf.* already Mich. 42 Edw. III, Rot. 45 (1369), *supra* note 34, where the Court of the King's Bench declined jurisdiction over the case of a petition against the governor of the island of Jersey for oppressions and wrongs done there, holding: "... nec aliqua negotia infra insula praedicta emergentia terminari non debent nisi secundum consuet. insulae praedictae. Ideo recordum retro traditur cancellario ut inde fiat commissio domini regis ad negotia praedicta in insula praedicta audienda & terminanda secundum consuet. insulae praedictae." (Italics supplied.)

Cf. also *Barker v. Maynard*, 2 SEL. PLEAS ADMIR., xlii (1531), where dispute was whether master's and mariners' wages or advance made to charterer (in England) should have priority; after the return of the ship, the creditor obtained judgment in the mayor's court of Dartmouth and arrested fish under process of this court; then the master of the ship articulated creditor and mayor for contempt of admiral's jurisdiction and fish was arrested by admiralty process; later, creditor appealed to king in chancery, and order was made that argument should be heard upon whether the question was to be tried according to the civil law or the common law. It was held that the civil law applied, and that, therefore, admiralty has jurisdiction.

In the record of the proceedings before admiralty prior to 1570 is found a petition by the owner of insured goods asking that arbitrators be appointed and underwriters made to pay, "forasmuche as your said rater hath noe remedye by the ordre and course of the common lawes of the realme, and that the ordre of insurance is not grounded upon the lawes of the realme, but rather a civill and maritime cause to be determined and decided by civililians, or else in the highe courte of Admiraltye." *Cf.* 2 SEL. PLEAS ADMIR. LXXVI.

Cf. *Corset v. Husely*, Holt K. B. 48, 90 Eng. Rep. 924 (1689), ship hypothecated at Rotterdam by master for necessary repairs, suit in Admiralty—prohibition denied, *per* Holt, C. J.: "It is a matter properly triable by the maritime law, and they have no remedy at common law." *Cf.* also *Johnson v. Shippin*, 1 Salk. 36, 91 Eng. Rep. 37, 11 Mod. 30, 88 Eng. Rep. 863 (1704), master of ship, while in Boston, New England, took up necessities, gave bill of sale by way of hypothecation, suit against ship in Admiralty—prohibition to Admiralty asked, but denied, "for the master can have no credit abroad but upon giving security by hypothecation, and it is not reasonable we should hinder the Court of Admiralty to give a remedy, where we can give none ourselves." *Cf.* also 11 Mod. 30: "... should the admiralty be prohibited, their law quoad hypothecation, falls to the ground..." *Cf.* also *Menetone v. Gibbons*, 3 Term R. 268, 100 Eng. Rep. 568 (1789), hypothecation bond on ship, executed on land at Cork in Ireland, under a seal—held, Admiralty has jurisdiction, and Buller, J., said: "In such a case as the present the party could have no remedy in a court of Common Law, for the contract is merely in rem, and there is no personal covenant for the payment of the money." *Cf. infra* note 368.

¹⁵⁵ FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE (written soon after the year 1540, ed. with notes by Selden, 2d ed. 1775), c. 26: "Twelve good and lawful men being sworn, &c., then either party, by himself or his counsel, shall open them all matters

and evidence whereby he thinketh he may best inform them of the truth, and then may either party bring before them all such witnesses on his behalf as he may produce . . . not unknown witnesses, but neighbours, &c."; (c. 28): "The witnesses make their depositions in the presence of twelve creditable men, neighbours to the deed that is in question, and to the circumstances of the same, and who also know the manners and conditions of the witnesses, and know whether they be men worthy to be credited or not." Quoted from 1 REEVES, HISTORY OF ENGLISH LAW (1869), CII, n., also vol. 2, at 540. Cf. also (revised translation) in POUND & PLUCKNETT, READINGS ON HISTORY OF COMMON LAW (3d ed. 1927) 158.

¹³⁶ THAYER, PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW (1898) 129-130, n.

¹³⁷ 5 Eliz., c. 9, § 12 (1562).

¹³⁸ Co. 3 INST. 163: "most commonly juries are lead by deposition of witnesses."

¹³⁹ For difficulties in deciding the question where, in such a case, the jury was to be chosen, and conflicting decisions in the fourteenth century concerning this matter, cf. 2 REEVES, *op. cit. supra* note 135, at 409 *et seq.* For the question: "Hors de Quel Countie le visne viendra quant parte de matter d'estre enquire est un Countie, & parte en auter," cf. 2 ROLL, ABRIDGMENT, t. Trial, 602, (35) *et seq.*

¹⁴⁰ Ilderton v. Ilderton, 2 H. Bl. 145, 161, 126 Eng. Rep. 477, 484 (1793), *per* Eyre, C. J.

¹⁴¹ Bulwer's Case, 7 Co. Rep. 1a, 77 Eng. Rep. 411 (1586); also *sub nom.* Bulwer and Smith's Case, 4 Leon. 52, 74 Eng. Rep. 724; action on the case in the county of Norfolk for maliciously causing plaintiff to be outlawed in London upon process sued out of a court at Westminster and causing him to be imprisoned in Norfolk upon a *capias utlagatum* issued at Westminster but directed to sheriff of Norfolk. Upon demurrer on the ground that action should be laid in Middlesex, "where the wrong began," it was held that the action was well brought in Norfolk.

¹⁴² Bulwer's Case, *supra* note 141. Cf. Mayor of London v. Cole, 7 Term Rep. 587, 101 Eng. Rep. 1146 (1798), *per* Lord Kenyon, C.J., quoting from 2 Str. 727, 23 Eng. Rep. 811: "7 Co. Bulwer's case is express that where matter in one county is dependant on matter in another county, the Pl. may lay his action in either. *Et per Curiam*: the law is cetrainly so"; *per* Lawrence, J. (at 588, 1146): "The rule laid down in Bulwer's case . . . shews that where several material facts arise in different counties the pl. may bring his action in either."

Cf. also Evone v. Theobald (1688), 1 LILLY, PRACTICAL REGISTER (1719), t. Actions, 16; Gregson v. Heather, 2 Str. 727, 93 Eng. Rep. 811 (1726), 2 Ld. Raym. 1455, 92 Eng. Rep. 447; Scott v. Brest, 2 Term. Rep. 241, 100 Eng. Rep. 231 (1788).

¹⁴³ Ilderton v. Ilderton, 2 H. Bl. 145, 161, 128 Eng. Rep. 478, 484 (1793), *per* Eyre, C. J.

¹⁴⁴ Cf. Y. B. Hil. 48 Edw. III, pl. 6, fo. 2-3 (1375), *supra* note 49, where Finchden said: "Si un home soit lowe per moy d'aler en mon message a Rome comment que le service sera fait hors de Roialme uncore pur le contrat fait in Engleterre il demandera son lower en cest court"; Tank puts the case of a sailor hired in England: "Il sera demande en cest court p. la comen ley et nemy per la ley de Mariner."

Cf. also Y. B., 15 Edw. IV, 14 (1476), *supra* note 51, in 2 BROOKE, ABRIDGEMENT, t. Trialles, fo. 302 (b), pl. 46: "Det, p. Littleton, si ico sue lie a J. de luy server in Normandy p un an, & le def. plede accordaunt, le pl. poet dire q ico sue icy in Engl. tiel temps in m. lan a tiel lieu, et issue serr priss de confinio regni . . ."

¹⁶⁵ Y. B., Hil. 7 Hen. VII, pl. 1, fo. 8 (1492), in 2 BROOKE, ABRIDGEMENT, t. Trialles, fo. 303 (b), pl. 93: "Per Hussey chief justice in divers cases jurors prendre. conuss. de acte fait in aut. cont., coe deskip marchandise a Venice, ou de fraught foreign ship a Burdeaux contr statut et de alien nec ultra mare ceox choses sra tryes in Engl. Et forrein com. tryera dam. in aut. com. Keble, iur. dun com. troa fait de grant de rent charge in un com. extra tras in aut. com., & leas & releas fait in forrein com. serra trye en le com. ou le tre gist & reteindr in Engl. de serv ultra mare serra trye in Engl." Keble further said: "Si on port accion de Debt pur son salary que il fuit retenu a servir un home in Briggs oustre la mer, et le Maistre dit que il depart de luy ou ne servit, ceo serra trie icy ou le bref est port." Cf. *supra* note 51.

According to the report of this case in *Les Reports des Cases*, "Keble a mesme l'entent [with Hussey]. Car e moult des cases ou le Jur. avoit conis. de princ. ils purr enquerir del' accessoir coment que ils sont in forain county . . ."

¹⁶⁶ Y. B., Pasch. 10 Hen. VII, pl. 21, fo. 22 (1495)—action of debt upon bond, made in England, conditioned on the sailing of a certain ship to Lynn, from thence to Norway, and returning from Norway to London—it was argued that as Norway was a place *ultra mare*, no jury in England could try or know whether the ship had been in Norway, and therefore the condition containing matter not triable was void and so the bond must stand good and be available as a single bond. The condition is differently stated in Y. B., Hil. 11 Hen. VII, pl. 13, fo. 16 (1496), but still in such a way as to make the return from Norway material. Cf. *King v. Burdett*, 4 B. & Ald. 172, 126 Eng. Rep. 873 (1820) *per* Abbott, C.J.: "[the case of 10-11 Hen. VII] appears not to have been decided at that time and I have not traced the final result."

¹⁶⁷ Cf. Y. B., Hil. 11 Hen. VII, pl. 13, fo. 16 (1496), as reported in 2 BROOKE, ABRIDGEMENT, t. Trialles, fo. 305 (a), pl. 154: "Nota p. Vanisor si act soit dester fait tout ultra mare c ne poet ester trie e Engleterre mes ou pt est dester fait en Anglitter & pt ultra mare c poet este trie en Anglitter, come obligac. ove condicion que si obligaz. port les merchandises l'oblige de Norway ultra mare a Lyn en Anglitter qd tunc &c. et concordat Fineux, & q. si home soit oblige de carter les biens queux il livra hic al Burdeux ultra mare, ceo poet ester try icy, et Townsende concordat, tn contr. Brian."

According to the report of this case in *Les Reports des Cases*, Brian dissented on the ground that "l'performance ne poet av. trial, et tiel chose qui ne poet estre trie est void. Et cel' condic est en l'affirmative, cestassavoir que il conveier a Norway etc. . . et si jeo retiens un hoe a aller ave moy in Britaine, s'il retourne icy sans ma license, c poit estre trie icy [cf. *supra* note 51]. Mes s'il me servoit la ou nemy, c ne poit estre trie icy. Issiut in ce cas s'il deliv'a les biens in aucun port deins Angleterre, c poit estre trie icy: mes s'il eux conveya bien p le mer ou nemy; ou s'ils furent surrondre in le mer ou nemy, ne poit estre trie icy."

But Vavisor again repeated his reason for assuming jurisdiction: "p c q parcel del' action fuit fait en Angleterre."

¹⁶⁸ Y. B., Mich. 21 Hen. VII, pl. 32, fo. 34 (a) (1505), where Fineux said: ". . . si contract soit triable parcel deins ce realm, et parcel oultre la mer, il sera trie icy en tout."

¹⁶⁹ *Gynne v. Constantine* (1586), reported in *Dowdale's Case*, 6 Co. Rep. 48 (a), 77 Eng. Rep. 325, also in Co. Litt. 261 (b), Constantine by indenture of a charter-party made at Thetford, in Norfolk, did covenant with Gynne that such ship should sail from Blackney in Norfolk to Muttrell, Spain, and should there stay for certain time, and bound himself in 500 pounds to perform it; issue was whether the ship did stay at Muttrell for certain time.

¹⁷⁰ Taylor v. Rebera, Godb. 77, 78 Eng. Rep. 46 (1587)—action of debt upon bond of 800 pounds endorsed by defendant with condition that if plaintiff did bring ship to a place in Greece and stay there for up to forty days as should please defendant, so as defendant might freight the ship, bond to be void—defendant pleaded that within these forty days, *viz.* by the space of twenty-four days, ship was laden, so as defendant could not freight it; plaintiff demurred upon pleas; plaintiff contended that the matter could not be tried here, for jury cannot take notice of a thing done *ultra mare*. "The difference taken" in 10 and 11 Henry VII, *supra* note 166, was noted, but "it was adjourned."

¹⁷¹ Anon. (1589), reported in Dowdale's Case, 6 Co. Rep. 48 (a), 77 Eng. Rep. 325, and quoted as follows in Cremer and Tookley's Case, Godb. 385, 78 Eng. Rep. 227 (1628): "In an action upon the case upon assumpsit, the plaintiff did declare that the defendant at London did assume that such a ship should sail from Melcomb Regis in Suffolk to Abville in France: the issue was tried in London, because the contract was made in England."

But inferior courts (*cf.* also *infra* notes 189, 194) did not have jurisdiction in such cases. *Cf.* Brian and Langhorne (1640), 1 ROLLE, ABRIDGMENT, fo. 545, (33)—action on the case in an inferior court—plaintiff declared that defendant undertook within jurisdiction of the court to pay plaintiff 5 pounds in consideration of a certain ship's going from Yarmouth, which is without the jurisdiction, to Amsterdam; held, this is not triable in the inferior court, "pur ce que ils ne poient enquirer de ceus choses que sont hors de leur jurisdiction, & sans eux l'action ne gist, coment l'agreement fuit deins le jurisdiction."

¹⁷² Banning's Case (1604), 1 ROLLE, ABRIDGMENT, fo. 332, pl. 13, also 571, (45), also VINER, ABRIDGMENT, t. Court of Admiralty, 526.

Crane v. Bell (1547), ZOUCH, *loc. cit.* *supra* note 151, 107; assurance made at Dartmouth, that such ship should pass without taking, but was afterwards surprised by the Spaniard on the high seas; it was held that the case was not determinable by admiralty, as promise was made on land.

¹⁷³ Leighton v. Green and Garret, Godb. 204, 78 Eng. Rep. 124 (1614): "And so was it adjudged in Constantine and Gynn's case" (*supra* note 169).

¹⁷⁴ Maldonado & Slaney Case (1625), 1 ROLLE, ABRIDGMENT, fo. 532-533, pl. 16.

¹⁷⁵ Co. 4 INSTR. 134-139, where a number of authorities is cited. *Cf.* Smart v. Wolfe, 3 Term. Rep. 323, 348, 100 Eng. Rep. 500 (1789), *per* Buller, J.: "With respect to what is said relative to the Admiralty jurisdiction in 4 INSTR. 135, that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction."

Cf. also Antiquity of the Court of the Admiralty, 8 Jac. (1611), 12 Co. Rep. 79, 77 Eng. Rep. 1357: "... if part of the matter be done upon the sea, and part in a county, then the common law shall have all the jurisdiction ... the admiral hath jurisdiction where the common law cannot give remedy ... that which may be tried by the common law, doth not belong to the admiral's jurisdiction."

¹⁷⁶ Cremer v. Tookley's Case, Godb. 385, 78 Eng. Rep. 227 (1627). Tookley forced Cremer to appear and prosecuted suit upon charter-party in the admiralty court; this was an action of debt brought by Cremer against Tookley for suing in admiralty against STATUTES of 13 Rich. II, c. 5, and 15 Rich. II, c. 3 (*cf.* *supra* notes 129, 130), and 2 Hen.

IV, c. 11. (*supra* note 131). Said Calthrop, counsel for Tookley: "I confess if part of the thing to be done here upon the land, that it is triable at the common law. . ."

¹⁷⁷ Anon., 4 Leon. 147, 74 Eng. Rep. 786 (1576).

¹⁷⁸ Cf. also Furnes & Smith Case (1614), *per curiam*, 1 ROLLE, ABRIDGMENT, fo. 530, 1, 39, also 6 VINER, ABRIDGMENT, fo. 517, pl. 3—contract made at Saint Christopher's beyond the seas by an infant as master of ship to carry certain goods from there to England, which he had not delivered, but wasted and consumed—he was sued in admiralty and prohibition was denied.

¹⁷⁹ Don Alonso v. Cornero, Hobart 212, 80 Eng. Rep. 359 (1612), also *sub nom.* Sir John Watts, in 2 Brownl. & Golds. 28, 125 Eng. Rep. 797: Don Alonso de Velasco, Spanish Ambassador, libeled in the Admiral Court against Cornero, Spanish subject, declaring that Cornero had committed crimes against the king, for which all his goods were confiscated and that he was come to England and had brought with him tobacco to the value of 800 pounds; tobacco was attached by process of the admiralty in the hands of Sir John Watts; it was moved for prohibition for Watts, who had bought tobacco of Cornero for 800 pounds in *open market* (2 Br. & Golds. 28). Prohibition was granted, and "the judges said . . . if any subject of a foreign prince bring goods into the kingdom, though they were confiscated before, the property of them shall not here be questioned but at the common law . . . The like prohibition was granted Hill. 9 Jac. upon the like libel by Don Pedro de Suneaga Embassador for Spain" (Hob. 212). Cf. also VINER, ABRIDGMENT, t. Court of Admiralty, 512: "Sir John Watts, who was the vendee, was not made party to suit, yet in as much as he bought them in *market overt*, and that by this suit the property will be drawn in question in the Admiralty, where it was prosecuted, prohibition was granted." Cf. also Hob. 79, 80 Eng. Rep. 229: "Sir John Watts had a prohibition . . . for the property of goods here at land must be tried by the common law, however the property be guided." (Italics supplied.)

¹⁸⁰ Anon., Cro. Eliz. 685, 78 Eng. Rep. 921 (1599).

¹⁸¹ Ridly v. Egglefield, 2 Lev. 25, 83 Eng. Rep. 136 (1672); also Radly v. Egglefield, 1 Vent. 173, 86 Eng. Rep. 118; Radly v. Egglefield, 2 Keble 828, 84 Eng. Rep. 524; contraband goods, going to the Dutch during war with them, taken by pirates, condemned in Scotland, and being brought into England, suit for them in the admiralty after their sale. Action, upon 13 Rich. II, c. 5, *supra* note 129, and 2 Hen. IV, c. 11, *supra* note 131, for suing in admiralty. The action was dismissed, "for the original cause being piracy, it belongs to the Admiralty, and that goods were condemned in Admiralty of Scotland does not alter the case, but is pleadable in the Admiralty of England as a judgment."

Cf. also Spark v. Stafford, Hardress 183, 145 Eng. Rep. 442 (1662)—ship taken by pirates upon the sea, master contracted with pirates to redeem ship for 50 pounds, pirate carried him to the isle of "Scilly" where he borrowed money and paid the pirates—he sued in admiralty for 50 pounds, prohibition denied, as "original cause arose upon sea, whatever followed was but accessory." Cf. also Trantor v. Watson, 6 Mod. 12, 87 Eng. Rep. 777 (1704); Anonymous, 11 Mod. 6, 88 Eng. Rep. 849 (1702). Thompson v. Smith, 1 Sid. 320, 82 Eng. Rep. 1132 (1668)—ship condemned as prize in Scotland, later sold—libel in admiralty in England claiming that captured vessel was not Danish, but English; prohibition denied, "Intant que le matter est prize ou nient prize nul prohibition serra." Anonymous, 12 Mod. 16, 88 Eng. Rep. 1135 (1692): "Where there is a false capture of goods at sea, the admiral has jurisdiction; and if they be brought

to land, the Common law has; and the cause may be brought in either place, at the plaintiff's election."

Cf. also *Tremoulin v. Sands*, Comb. 462, 90 Eng. Rep. 592 (1698), *per* Holt, C.J.: ". . . wherever [the Admiralty] have not original jurisdiction of the cause, though there arise a question in it that is proper for their consuance, yet that alters not, nor takes away the power of the common law: but if they have jurisdiction of the original, tho' a question ariseth proper for the common law yet they shall try that. . . ."

Cf. also *Turner v. Nele*, 1 Lev. 243, 1 Sid. 367 (1669); *Brown v. Franklin*, Carth. 474, 90 Eng. Rep. 873 (1699); *King v. Broom*, Carth. 398, 90 Eng. Rep. 831 (1697); also *Key v. Pearse* (1742) and *Rous v. Hassard* (1750), quoted in 2 Dougl. 602, 605, 619, 90 Eng. Rep. 379, 381, 391. *Cf. infra* note 370.

¹⁸² 1 ROLLE ABRIDGMENT, fo. 530, pl. 4, reports the case of *Joliff, Tucker, and Bingley* (1616), *infra* note 245, as follows: goods were brought into England and sold there *on market overt*; it was held the common-law rule on such sales prevailed over that of the admiralty. "Comment que per le Admirall ley cest sale ne liera mes que l'owner poet ici cuex reprendre, encore per le common ley cest sale luy liera, la ley del Admiraltie doit prendre notice de ceo." *Cf. Co. 2 INST.* 713.

¹⁸³ The distinction seems not to have been noticed by Sir W. Scott, in *Hercules*, 2 Dods. 353, 372, 165 Eng. Rep. 1511, 1516 (1819), who, after mentioning the *Bingley's* Case, *supra* note 182, said: ". . . but in the latter case of *Eggesfield* [*supra* note 181] Sir M. Hale held clearly that if goods are taken *piratice*, and sold afterwards at land, the Admiralty hath cognisance thereof, for that which is incident to the original matter shall not take away the jurisdiction, though there be another resolution in *Bingley's* case (Godbolt, 193); and said, that one hundred such suits had been determined in the Admiralty, &c."

¹⁸⁴ *Bridgeman's Case*, Hob. 11, 80 Eng. Rep. 162 (1614), also *sub nom.* *Barnard v. Bridgeman*, Moore (K. B.) 918, 72 Eng. Rep. 1308.

¹⁸⁵ *Cf. Freeman v. The East India Co.*, 5 B. & Ald. 616, 106 Eng. Rep. 1316 (1822); *Segredo*, otherwise *Eliza Cornish*, 1 Sp. Ecc. & Adm. 37, 164 Eng. Rep. 22 (1853); and *Cammell v. Sewell*, 5 H. & N. 728, 157 Eng. Rep. 1371 (1860); *infra* notes 376, 381, 382.

¹⁸⁶ *Southerne v. Howe*, 2 Rolle 5, 25, 81 Eng. Rep. 621, 635 (1618), also *Popham* 143, 79 Eng. Rep. 1243.

¹⁸⁷ *Haywood & Anne Davyes Case*, 1 ROLLE ABRIDGMENT, fo. 533, pl. 22 (1639).

¹⁸⁸ *Cf. Queen v. Lord Vaux and others*, 1 Leon. 37, 74 Eng. Rep. 35 (1586)—bill of intrusion into rectory of *Ethelborough* in County of Northampton, and took one thousand sheep, etc.—defendants justified taking at *Ethelborough*, *absque hoc* that they took said sheep at *Westminster*, etc.; held for plaintiff, *Manwood*, C.B., saying, that the county was not traversable, for when tithes are severed they are things transitory, and also the taking of them, for the party may take them in any place.

Bullock v. Smith, Cro. Eliz. 174, 78 Eng. Rep. 431 (1589)—trover and conversion of six oxen in London—defendant pleaded he seized them as waifs at the manor of *D.* in *Essex*, and traversed that he was guilty in London; held, plea bad, as not containing local matter to make place material.

Cowleigh v. Edwards, Cro. Eliz. 184, 78 Eng. Rep. 441 (1589)—false imprisonment at *Bristol*—defendant justified arresting plaintiff at *Gloucester* under commission of rebellion, and traversed imprisonment at *Bristol*; held, plea bad, as matter of justification

transitory, and defendant ought to have justified in place where action was brought. *Cf. infra* note 190.

Sands v. Lane, Cro. Eliz. 667, 78 Eng. Rep. 905 (1598)—trespass, taking of beasts—justification, beasts damage *feasant*, *absque hoc quod cepit apud Stockbridge*, etc.; held for plaintiff, as justification not local.

Purset v. Hutchings, Cro. Eliz. 842, 78 Eng. Rep. 1068 (1601)—assault and battery in London—defendant pleaded *son assault* at D. in the county of Sussex, and traversed that he was guilty in London; held, *pica* bad, as cause of justification not local.

¹⁸⁹ Already statute of Westminster I (1275), c. 35, restrained inferior courts from compelling men to answer before them regarding contracts, covenants, or trespasses done without their jurisdiction.

Cf. Quarles v. Searle, Cro. Jac. 95, 79 Eng. Rep. 82 (1605)—replevin in an inferior court—declaration was *not* that place of taking was *infra jurisdictionem Curiae*; judgment for plaintiff; writ of error; reversed.

Squibb v. Hole, 2 Mod. 22, 86 Eng. Rep. 922 (1676)—debt in inferior court on bond stated to be made within jurisdiction—found by special verdict bond *not* made within jurisdiction; held, action will not lie.

—*v. Lee*, 1 Ld. Raymond 210, 91 Eng. Rep. 1036 (1697), holding *indebitatus assumpsit* in an inferior court must state consideration of promise to have arisen within jurisdiction, otherwise it will be bad even after verdict. "Though the debt is transitory, and is a debt in every part of England, yet it ought to be laid to arise within the jurisdiction of the Inferior Court."

Stannigan v. Davis, 1 Salk. 404, 91 Eng. Rep. 550 (1705), also 6 Mod. 223, 87 Eng. Rep. 974—error of a judgment in a palace court—plaintiff declared that in such a parish in Middlesex county he delivered to defendant innkeeper a gelding safely to be kept, and that defendant suffered him to be taken out of stable and rid so immoderately that gelding was spoiled, riding was not within jurisdiction of the palace court; held *per Cur.*: "In actions in Inferior Courts it is necessary that every part of that which is the gist of the action should appear to be within their jurisdiction."

Cf. also *Higginson v. Martin and Hadley*, 2 Mod. 195, 86 Eng. Rep. 1021 (1718); *Waldox v. Cooper*, 2 Wils. 16, 95 Eng. Rep. 661 (1754), holding that the declaration (in the borough court of Aylesbury) must allege that the goods were sold and delivered within the jurisdiction and not only that the defendant promised within it.

Cf. also infra note 194, *in fine*.

¹⁹⁰ As to what justification is local, *cf. Peacock v. Peacock*, Cro. Eliz. 705, 78 Eng. Rep. 940 (1599), also Cro. Eliz. 842, 78 Eng. Rep. 1068—action for assault and battery in county X—plea by defendant, *molliter manus imposuit* to prevent plaintiff from entering defendant's house in county Y, and traverse *absque hoc*, that he is *culpabilis extra* (Waltham, in the county of Essex); upon demurrer, held plea was local, at 705, 940: "for the cause of justification being local, viz. the maintaining of the possession of his house, he may well justify, and he cannot justify in another place; and he may traverse every other place. . . ."

For other cases of local justifications *cf. Ford v. Brooke*, Cro. Eliz. 261, 78 Eng. Rep. 576 (1592); *Bowyer's Case*, Cro. Eliz. 468, 78 Eng. Rep. 705 (1597); *Clark v. James*, Cro. Eliz. 870, 78 Eng. Rep. 1096 (1602); *Sturges v. Judkin*, Cro. Jac. 95, 79 Eng. Rep. 81 (1606).

Pine v. Countess of Leicester, Hobart 37, 80 Eng. Rep. 187 (1613), held, that debt

for arrearages of rent, based on privity of estate, is local; *Smith's Case*, Godb. 386, 78 Eng. Rep. 227 (1627), also *sub nom.* *Smith v. Wayt*, Latch. 197, 82 Eng. Rep. 343—debt by lessor in London against assignee of lessee, land in Middlesex—held, not well brought, as privity was of estate, not of contract; *Sir Stephen Boyd v. Cudmore*, Cro. Car. 183, 79 Eng. Rep. 761 (1631)—debt brought in London by assignee of a reversion of land in county of Somerset, upon lease for years made at London, rent payable at London—held, must be brought where land lies, as privity of the contract is gone by assignment of the reversion, and the rent follows land.

Cf. also *Floide and Bethold*, 2 Rolle 141, 81 Eng. Rep. 712 (1620)—trover and conversion of corn in Middlesex—defendant moved action should be brought in Wales, as corn grew there and title to land will come in question; court refused to compel plaintiff to change county, but if defendant could by his plea make title to land come in question, court would then coerce plaintiff to bring his action "in le prochain court adjonant in Gales, ou le terre gist." *Cf. supra* notes 66 to 71.

By stat. 21 Jac., c. 12 (1624), suits against public officers should be prosecuted in the county where the offense was committed. *Cf. Barnes v. Hughes*, 1 Sid. 400, 82 Eng. Rep. 1180 (1669). *Cf. infra* note 334.

Where issue is upon *custom* of a manor, venue should be from manor only, *cf. Bursty v. Challenor*, Cro. Eliz. 855, 78 Eng. Rep. 1081 (1602). An action against innkeepers based on *local custom* was held to be a local action, *Anonym.* Godb. 42, 78 Eng. Rep. 26 (1587). *Cf.* also *Banks v. Parker*, Hob. 76, 80 Eng. Rep. 226 (1615), *Brownl.* 233, 123 Eng. Rep. 773-4; *Sir Thomas Puckerings Case*, Benloe 148, 73 Eng. Rep. 1002 (1625); *Mayor of Berwick v. Ewart*, 2 W. Bl. 1068, 96 Eng. Rep. 622 (1776).

¹⁹¹ 16 & 17 Car. II, c. 8, § 1 (1665), made perpetual by 22 & 23 Car. II, c. 4 (1671).

¹⁹² "Was never intended to cure those defects where the case appears to be tried in an improper county, but only those where the venue was wrong, which meant no more at that time than that the jury were not returned *de vicineto*, or in other words there were no hundredors returned: but the statute expressly states that it must be tried in the proper county": *The Bailiffs etc. of Litchfield v. Slater*, Willes 432, 435, 125 Eng. Rep. 1253, 1255 (1743), *per Willes*, C. J.; *cf. also idem*, at 436, 1256: "Lord Chief Justice Hale, Holt, Treby, and so many other great men were of the same opinion with us."

Cf. Chew v. Briggs, 8 Mod. 7, 88 Eng. Rep. 1129 (1632), for the opinion of Holt, C.J., regarding the meaning of 16 & 17 Car. II, c. 8. But Dolben, Gregory, and Eyre, J.J., were *contra*—Eyre, J.: "If it had been *res integra*, I should be of another opinion, but all resolutions being otherwise, I accord." *Cf.* cases in next note.

¹⁹³ *Craft v. Boite*, 1 Saund. 246, 85 Eng. Rep. 289 (1670)—action laid in London for slanderous words spoken there—defendant pleaded local justification in county of Oxford, where thereon tried in London, and not in Oxford, as it ought to be; held, this was aided by the statute, Twisden, J., dissenting.

Cf. also Jennings v. Hunking, 1 Ventris 263, 86 Eng. Rep. 176 (1674), also in 2 Lev. 121, 83 Eng. Rep. 478—action for saying he was perjured, declaration laid in Devonshire—defendant justified that plaintiff made false affidavit in Cornwall, issue was taken upon that and tried at assizes in Devonshire, motion that this was mistrial; held for plaintiff on ground (1 Ventris 263) "it was within the words of the Act," though "not within the meaning"; Hale, C. J., said (2 Lev. 121) that "the intent of

that statute was only to cure trials by improper venues taken in the same county where the matter is to be tried."

²⁹⁴ *Hunt's Case*, 3 Lev. 394, 83 Eng. Rep. 747 (1695)—debt for rent in London of lands in Essex—defendant partly pleaded *nil debet* and as to residue an entry and expulsion, on which they were at issue; verdict for plaintiff; upon motion in arrest of judgment, that the issue as to expulsion was local and to be tried in Essex, held cured by the new statute, "although some of the most considerable of the Judges . . . were of a contrary opinion."

Sir Richard Leving v. Lady Caverly, Ld. Raym. 331, 91 Eng. Rep. 1116, Carthew 448, 90 Eng. Rep. 859 (1699)—action of covenant to repair house in City of Chester, laid in county of Chester at large—verdict for plaintiff; motion in arrest of judgment for that issue was local and ought to have been tried in county of City of Chester; held, cured by last statute of Jeofails.

City of Litchfield v. Slater, Willes 432, 125 Eng. Rep. 1253 (1743), action of covenant declared in county of Stafford, laid in county of Litchfield, held, aided by statute.

Mayor etc. of London v. Cole, 7 Term Rep. 583, 101 Eng. Rep. 1144 (1798), covenant by lessors against assignees of lessees, land in county of Middlesex, action brought in London where deed was executed, action for recovery of damages only; held defect, if any, aided, after verdict, by statute 16 & 17 Car. II, c. 8.

The inferior courts remained, however, subject to the old rule. *Cf. Trevor v. Wall*, 1 Term Rep. 151, 99 Eng. Rep. 1024 (1788), holding that in an inferior court declarations must allege that money was had and received, as well as promise was to pay, within the jurisdiction; that none of the statutes of Jeofails assist in the present case; and, therefore, that if any one count in the declaration be bad, and the judgment be general, *venire de novo* cannot be awarded and the judgment must be reversed *in toto*. *Cf. supra* note 189.

²⁹⁵ *Supra* notes 45 and 46.

²⁹⁶ *Cf. Slade v. Morley*, 4 Co. Rep. 92 (b), 76 Eng. Rep. 1074 (1602), holding that although an action of debt lies upon the contract, yet the bargainer may have an action on the case or an action of debt at his election, and that the plaintiff in this action on the case in assumpsit should recover damages not only for the special loss (if any) which he had sustained, but also for the whole debt. Before this case, the notion prevailed that on simple contracts for sum certain, or for any money demand, the action must be in debt. *Cf. also* *Egles v. Vale*, Cro. Jac. 69, 79 Eng. Rep. 223 (1607). For the old form of the writ of assumpsit, resembling a declaration in case for tort, *cf. FITZGERBERT, NATURA BREVIVM* (1534, 9th ed. 1794) *94 (a).

²⁹⁷ *Peacock v. Bell and Kendall*, 1 Saund. 73, 85 Eng. Rep. 84 (1668), also *sub nom. Hicocks v. Bell*, 2 Keble 183, 84 Eng. Rep. 114, and *Peacock v. Bell and Kendall*, 2 Keble 227, 84 Eng. Rep. 142; plaintiffs declared, in county palatine of Durham, that defendant, in Durham, was indebted to them in a certain sum for divers merchandises, by plaintiffs to defendant sold and delivered, and being so indebted he promised to pay; upon *non assumpsit* pleaded, a verdict and judgment were given for plaintiff; writ of error was brought by defendant and common error assigned; exception was taken to declaration that it did not say merchandise was sold and delivered in Durham, and therefore it did not appear to be within jurisdiction of the court. It was held that it was not necessary to allege in declaration that cause of action arose within jurisdiction of the court, "for it shall be so intended, as it [a County Palatine] is an

original Superior Court." *Cole v. Hawkins*, 10 Mod. 251, 348, 88 Eng. Rep. 714, 759 (1715), declaration upon a promise, Powys, J. (252, 715): "In transitory actions time and place must be laid for form's sake, as to the defendant and jury; for the jury are not bound by it, and the defendant cannot traverse it without a special justification."

¹⁹⁸ *Whitehead v. Brown*, 1 Lev. 96, 83 Eng. Rep. 315 (1664). *Cf.* also *Collins v. Sutton*, 1 Lev. 149, 83 Eng. Rep. 342 (1665).

¹⁹⁹ *Cf.* FITZHERBERT, ABRIDGEMENT, t. Briefe, 18. *Cf. supra* note 45.

²⁰⁰ *Cf.* *Knight v. Barnaby*, 2 Salk. 670, 91 Eng. Rep. 571 (1706), *per* Lord Holt.

²⁰¹ *Cf.* *Williams*, notes to 1 Saund. 74, n. 2, 85 Eng. Rep. 84: "for the judges have construed the statute [6 Rich. II, c. 2, *supra* note 45] to empower them to change venue under those circumstances." *Cf.* also 2 Saund. 5, n., 85 Eng. Rep. 539.

²⁰² *Williams*, notes to 1 Saund. 74: "and if on the trial he fails to do so, he must be non-suited, which in this case has the effect of abating the writ according to the statute." *Cf.* *Santler v. Heard*, 2 W. Black. 1032, 96 Eng. Rep. 605 (1775); *Bruckshaw v. Hopkins*, 1 Cowp. 409, 98 Eng. Rep. 1157 (1776); *Watkins v. Tower*, 2 Term Rep. 275, 100 Eng. Rep. 150 (1788).

²⁰³ *Cf.* *Santler v. Heard*, 2 W. Black. 1031, 96 Eng. Rep. 605 (1775).

²⁰⁴ *Williams*, notes to 1 Saund. 74, n. 2, 85 Eng. Rep. 84. *Cf.* *Anonym.*, 11 Mod. 51, 88 Eng. Rep. 878 (1706): "... making of a bond without dating makes it transitory, and may be said to be made all over England."

²⁰⁵ *Pretty v. Roberts*, 1 Keble 594, 83 Eng. Rep. 1131 (1664), *per* Hyde, C. J.: In this case debt upon obligation dated in Surrey was brought in London. "One Blumley of the Inner Temple" pleaded stat. 6 Rich. II, c. 2 (*supra* note 45), that all obligations ought to be sued in their proper counties as dated. "*Per Curiam* is a frivolous plea, and Hyde, C.J. would have forejudged him the bar for pleading it. . . ."

²⁰⁶ *Williams*, notes to 1 Saund. 74, n. 2, 85 Eng. Rep. 84.

²⁰⁷ *Ibid.*, citing Co. 2 Inst. 231. *Cf.* *Collins v. Sutton*, 1 Lev. 149, 83 Eng. Rep. 342 (1665), debt on obligation at London, condition that if such ship did not miscarry in such a voyage to pay &c., defendant pleads ship miscarried in Cornwall, plaintiff demurs, judgment for plaintiff, "for all this matter is transitory, and plaintiff hath election to bring his action in which county he pleases and defendant is obliged to plead to all transitory matters, as this is, in the same county. . . ."

²⁰⁸ *Bulwer's Case*, 7 Co. Rep. 3 (a), *supra* note 161.

²⁰⁹ *Supra* note 201.

²¹⁰ 4 & 5 Ann., c. 16, § 6 (1705): "... and whereas great delays do frequently happen in trials by reason of challenge to the arrays of pannels of jurors and to the polls for default of hundredors, for prevention thereof for the future, be it enacted that from and after . . . every *venire facias* for the trial of any issue, in any action or suit in any of her Majesty's Courts of Record at Westminster be awarded of the body of the county where such issue is triable"

²¹¹ The practice of laying a venue to each traversable fact in the body of the pleadings continued to be observed, though no longer of any real utility, until the making of the *Regula Generalis* of Hil. T., 4 Will. IV (1834). Rule 8 of these Hilary Rules (promulgated under 3 & 4 Will. IV, c. 42, § 81) provided: "The name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration or in any subsequent pleading" *Cf.* Appendix to 5 Barn & Ad., V.

²²² *Cf.* *Ilderton v. Ilderton*, 2 H. Bl. 145, 161, 126 Eng. Rep. 476, 484 (1793), *per* Eyre, C.J.

If venue alleged in the margin of the pleading was untrue, the variance was still fatal in local actions; *cf.* *Bruckshaw v. Hopkins*, 1 Cowp. 409, 98 Eng. Rep. 1957 (1776).

By 3 & 4 Will. IV, c. 42, § 22 (1833), power was given to a judge to order the trial in a local action to be had elsewhere, if it be shown to his satisfaction that such course will be more convenient.

All restrictions in respect of venue have been removed only by the SUPREME COURT OF JUDICATURE ACT, 36-37 Vict. c. 66 (1873), and the AMENDMENT ACT, 38-39 Vict. c. 77 (1875), First schedule, Rules of Court, order 36, rule 1: "There shall be no local venue for trial of any action . . ."; now (revision 1917) order 36, rule 10.

²²³ *Cf.* *Ilderton v. Ilderton*, 2 H. Bl. 145, 162, 126 Eng. Rep. 476, 485 (1793), *per* Eyre, C.J.

²²⁴ *Cf.* the *Anon.* case of 1589, and *Dowdale's Case* (1606), *supra* notes 62 and 171. *Cf.* also *Shower*, as counsel, in *Barker v. Dormer*, 1 Show. 192, 196, 89 Eng. Rep. 531, 533 (1689).

²²⁵ Venue of such foreign cases was usually laid in Cheapside in London: "at the parish of St. Mary Le Bow, in the Ward of Cheap," *cf.*, *f. ex.*, *Mostyn v. Fabrigas*, 1 Cowp. 161, 98 Eng. Rep. 1021 (1774), also cases, *infra* notes 220, 228, 229.

²²⁶ *Cf.* Co. Litt., 261, (b): "An obligation made beyond the seas may be sued here in England, in what place the plaintiff will. What then if it beare date at Bourdeaux in France, where shall it be sued? And answer is made, that it may be alleged to be made in 'Quodam loco vocat' Burdeaux in France, in Istington in the county of Middlesex, and there it shall be tried, for whether there be such a place in Istington or no, is not traversible in that case." *Cf.* also COKE'S 4 INST. 134.

²²⁷ Brooke, who was common sergeant and recorder of London, after reporting in his ABRIDGEMENT, t. Faits, fo. 327 (b), pl. 95 (ed. 1573), the case of 1375, *supra* note 49, says: "... & sic utebatur in London tempore H. 8 [1509-1547] sur autiels faits quar le lieu nest traversible." *Cf.* also *id.*, t. Obligation, pl. 87, and BROOK, NEW CASES 83, 73 Eng. Rep. 883.

Cf. *Daniel v. Luker*, 3 Dyer 305 (a), 73 Eng. Rep. 687 (1571), suit in London upon bond made in Ireland by an Irish merchant, "supposing the bond to have been made in the parish of Saint Mary Le Bow, in the Ward of Cheap."

²²⁸ *Anon.* (1606), cited in the Ward's case, Latch. 3, 82 Eng. Rep. 244 (1625-1628).

²²⁹ *Anon.* (1613), cited in the Ward's case, *supra* note 218.

²³⁰ Ward's case, Latch. 3, 82 Eng. Rep. 244 (1625-1628).

²³¹ "Nous les Juges doïumus mainteyner le jurisdiction de nostre Court, si le case ne soit plain & evident d'estre hors de jurisdiction, et pour ce nous doïumus entend Hamburgh d'estre diens London, p mainteyn le action, quia aliter serroit hors de nostre jurisdic. Et si en verity nous sciamus le date d'estre al Hamburgh ouster le mere, donc come Judges ne prisamus notice est ouster le mere."

²³² *The Dutch West India Co. v. Jacob van Moser*, 1 Strange 612, 93 Eng. Rep. 733 (1795).

²³³ Note that this description "at Amsterdam, in Holland, etc." was held good. *Cf. infra* note 229.

²³⁴ Counsel for plaintiff said: "It is the common practice to bring actions here upon bills drawn in Holland payable in France and assigned to Dutch merchants."

²²⁵ PRYNNE, *ANIMADVERSIONS ON THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* (1669) 75, 77: "New strange poetical fiction . . . Imaginary signposts on Cheapside . . ." Cf. *Mostyn v. Fabrigas*, 1 Cowp. 161, 98 Eng. Rep. 1031 (1774), per Lord Mansfield: "... all actions of transitory nature that arise abroad may be laid as happening in an English county . . . the law has in that case invented a fiction, and has said the party shall first set out the description truly and then give a venue only for form and for the sake of trial, by a *videlicet*, in the county of Middlesex, or any other county. But no judge ever thought that when the declaration said in Fort St. George, viz. in Cheapside, that the plaintiff meant it was in Cheapside. It is a fiction of form. . . There are cases of offences on the high seas, where it is of necessity to lay in the declaration, that it was done upon the high seas, as the taking a ship. . . It is necessary in such actions to state in the declaration, that the ship was taken, or seized on the high seas, *videlicet*, in Cheapside. But it cannot be seriously contended that the Judge and jury who tried the cause fancy the ship is sailing in Cheapside; no, the plain sense of it is, that . . . Cheapside is named as a venue; which is saying no more, than that the party prays the action may be tried in London."

²²⁶ *Ilderton v. Ilderton*, 2 H. Bl. 145, 162, 126 Eng. Rep. 476, 485 (1793), per Eyre, C.J. Cf. note 211.

²²⁷ Cf. *Mostyn v. Fabrigas*, 1 Cowp. 161, 177, 98 Eng. Rep. 1039 (1774), per Lord Mansfield: "There are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad, as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at Westminster in Middlesex, and upon producing the deed, it bears date at Bengal, the action is gone, because it is such a variance between the deed and the declaration, as makes it appear to be a different instrument. There is some confusion in the books upon the Stat. 6 Ric. 2 [cf. *supra* note 45]. But I do not put the objection upon the statute. I rest it singly upon this ground. If the true date or description of the date is not stated it is a variance."

²²⁸ Cf. already in BROOK, *NEW CASES* 83, 73 Eng. Rep. 883, "Time H.8" (1509-1547): "If action sued upon a Deed, bearing date at Cane in Normandy, *dat. apud Cane*, &c. the plaintiff shall count that the deed was made at Cane in Com. Kanc. and good; for the place is not traversable [cf. *supra* note 217] . . . And also where in truth it was written in Cane, 'tis suable in England, where it bears date at large, and at no place certaine [cf. *supra* note 204]. But if it bee *dat. apud Cane* in Normandy, &c. *quaere* If the action lyes ec." Freeman v. King, 2 Keble 315, 84 Eng. Rep. 196 (1669): "... Windham said, that bond dated at Paris in France, may be laid at Paris in France in Islington; but where it's dated at Paris within the Kingdom of France, it's not triable at all; and so it hath been by good opinion held. . ."

Cf. *Roberts v. Harnage*, 2 Lord Raym. 1042, 92 Eng. Rep. 192 (1705), where it appeared by the declaration that the bond was made in London in the ward of Cheap; upon oyer the bond was set out and it appeared upon the face of it to be dated at Fort St. George in the East Indies; defendant pleaded variance in abatement, plaintiff demurred, and it was held bad. But the court said that it would have been good if laid at Fort St. George, in the East Indies; to wit, at London, in the Ward of Cheap. Cf. *Mostyn v. Fabrigas*, *supra* note 227, per Lord Mansfield: "The objection there was, that they had laid it falsely, for they had laid the bond as made at London, whereas, when the bond was produced, it appeared to be made at another place, which was a variance."

Cf. also same case, somewhat differently reported, in 6 Mod. Rep. 228, 87 Eng. Rep. 978.

²²⁹ In *Davis v. Yale*, 2 Lutw. 946, 950, 125 Eng. Rep. 528 (1699)—assault and false imprisonment of the plaintiff "at Fort St. George, in the East Indies, in parts beyond the seas, *viz.* at London, in the parish of St. Mary le Bow, in the ward of Cheap"—it was resolved by the whole court that the declaration was ill, because trespass is supposed to be committed at Fort St. George "in parts beyond the seas," *videlicet* in London, "which is repugnant and absurd." It seems that declaration was ill in that it contained, together with fictitious venue in London, which was proper, also words "in parts beyond the seas," which were utterly improper, because they destroyed the fiction!

Cf., on the other hand, *Parker v. Crook*, 10 Mod. 243, 88 Eng. Rep. 711 (1716)—action of covenant upon deed indented—defendant was said in the declaration to continue "at Fort St. George in *Indibus Orientalibus*"; it was objected to this declaration and it was pretended the court had no jurisdiction (Litch. 4, 82 Eng. Rep. 245, 2 Lutw. 950, 82 Eng. Rep. 530); plaintiff, notwithstanding the objection, had judgment. The reporter (10 Mod. 243) notes to this case: "The words in '*Indibus Orientalibus*' do not necessarily import the place to be out of England; there is a place called Holland in Lincolnshire; . . . in the case of *Ward v. Kedsgrave*, Pasch. 1 Car. [1625] *W. Jones* 69 [82 Eng. Rep. 36] the same objection taken and overruled."

²³⁰ *Cf. Anon.*, *Sayer* 78, 96 Eng. Rep. 808 (1753), holding that if a cause arose out of the realm, "the venue ought not to be changed; because the action may as well be tried in the county where the venue is laid, as in any other county where the cause of action did not arise."

Cf. Gerard v. De Roebeck, 1 H. Bl. 280 (1789), holding that undertaking to give material evidence in London, where venue was laid (*cf. supra* note 202), was by fiction of law well supported by proof of debt at Port L'Orient in France.

Cf. also McClure v. McKean, 2 Taunt. 196, 127 Eng. Rep. 1052 (1804)—suit for accounting, contract made and goods shipped in Lancashire, to be sold by commission at Barbadoes (a mixed case, *cf. supra* note 163); venue laid in London—rule *nisi* for changing venue to Lancaster discharged on ground that proof that cause of action partly arose in foreign country is sufficient compliance with undertaking to give material evidence in county where venue was laid.

²³¹ *Cf. 2 HALL, H. C. L.* (first published in 1713, 5th ed., 1794) 41: "at this day, the courts of Westminster hold plea of all transitory actions, wheresoever they arise: for it cannot appear upon the record where they did arise."

²³² *Thomlinson's Case*, 12 Co. Rep. 104, 77 Eng. Rep. 1379 (1605).

²³³ *Supra* note 129.

²³⁴ *Thomlinson* brought action for goods against Philips in common pleas, and thereupon Philips sued Thomlinson in admiralty; Thomlinson being committed for refusing to answer upon his oath to some interrogatories there proposed to him, brought *habens corpus*; held, that admiralty court is not of record, and by consequence cannot assess any fine in such a case as judges of a court of record may do. "This case was intended to have been inserted by my Lord Coke into his seventh report, but not then published because the King commanded that it should not be printed . . ." 12 Co. Rep. 104.

²³⁵ *Anon.*, 2 Brownl. & Golds. 10, 123 Eng. Rep. 785 (1611).

²³⁶ *Supra* note 129.

²³⁷ 2 Brownl. & Golds. 11, 123 Eng. Rep. 286, 1 ROLLE, ABRIDGMENT 431 (10),

notes also following cases of things done beyond the sea, holding admiralty had no jurisdiction: Leighes case (1609), *per curiam*; Hickman & Skinner (1609); Davison & Burneby, *per curiam* (1611).

²³⁸ Palmer v. Pope, Hob. 79, 80 Eng. Rep. 229 (1611), also Hob. 212, 80 Eng. Rep. 359; "... the court resolved, that a prohibition lay, because the original contract, though it were made at sea, yet was changed when it was put in writing sealed, which being at land changed the jurisdiction as to that point; but if it had been a writing only without seal, it had made no change; now then if the contract were at land, though the breach be at sea, which are two several acts, yet because these two must concur to make the cause of the suit which is entire, the party shall be forced to sue in the King's Court, because that and the Common Law must prevail against the other Courts and laws."

²³⁹ Jennings v. Audley, 2 Brownl. & Golds. 28, 125 Eng. Rep. 797 (1611), also in Hob. 79, 80 Eng. Rep. 229 and Hob. 212, 80 Eng. Rep. 259.

²⁴⁰ *Id.*, Hob. 212.

²⁴¹ Furnes & Smith Case (1614), *per curiam*, 1 ROLLE, ABRIDGMENT 530, 1, 39, also 6 VINER, ABRIDGMENT 517, pl. 3.

²⁴² *Supra* note 177.

²⁴³ The Spanish Ambassador, Don Degoe, Servient Deacuno v. John Buntish and John Pints (1615 and 1616), 2 Bulstrode 322, 80 Eng. Rep. 1156. In the same case, *sub nom.* Spanish Ambassador v. Pountes, 1 Rolle 133, 81 Eng. Rep. 381, it is reported that the ambassador himself discontinued suit in admiralty, and declared that he would sue at common law, and therefore, *per curiam*, prohibition was not issued.

²⁴⁴ 2 Bulstrode 322, 80 Eng. Rep. 1156.

²⁴⁵ Don Diego Serviento de Acuna, Embassador Leiger for the King of Spain, against Joliff and Tucker, and Sir Richard Bingly, Hob. 79, 80 Eng. Rep. 228 (1616), also Hob. 113, 80 Eng. Rep. 263. Prohibition was granted, "for the owner of the goods may have an action of trover for the goods at Common Law." 1 ROLLE, ABRIDGMENT 530, pl. 4, reports that in this case goods were brought to England and sold there on *market overt*. Cf. also *ibid.* 528 (50), and 531, 532. Cf. *supra* note 189.

²⁴⁶ Hob. 80. Cf. also Ball v. Trelawny, 1 Cro. Car. 603, 79 Eng. Rep. 1119 (1641)—contract made on land at New England, creditor obtained judgment in admiralty and put debtor in execution for 112 l.—this was bill against creditor, upon 2 Hen. IV, c. 11 (*supra* note 131), for suing in admiralty; held for plaintiff, as "it is out of the admiral's jurisdiction, and he hath no authority to meddle therewith."

²⁴⁷ *Supra* note 232. Cf. also Can v. Cary, 12 Mod. 34, 88 Eng. Rep. 1146 (1693).

²⁴⁸ *Supra* note 235.

²⁴⁹ 2 Brownl. & Golds. 11, 17, 123 Eng. Rep. 786, 782: "though the Admiralty Court had nothing to do with the matter, yet inasmuch as this court cannot hold plea of that (the contract being made in France) no prohibition."

²⁵⁰ During Coke's time. After dismissal of Coke, Sir Henry Mountague, when sworn as chief justice of the King's Bench, said (1616): "... I will not be busie in stirring questions, especially of Jurisdiction . . ." Moore, K. B., 830, 72 Eng. Rep. 933. Cf. also TANNER, CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, A.D. 1603-1625 (1930), 127 *et seq.*, "The Crown and the Judges."

²⁵¹ Co. 4 INST. 136-138. Cf. also *supra* notes 173, 174, 176.

²⁵² *Supra* sections I, II, and III.

²⁵³ *Supra* section I.

²⁵⁴ Cf. already Y. B., Pasc. 13 Edw. IV. pl. 5 (1474), *supra* note 88; MALYNES, *CONSUETUDO VEL LEX MERCATORIA, OR THE ANCIENT LAW MERCHANT* (1622, 3d. ed. 1686) 5, explains that this law "is a customary law approved by the authority of all kingdoms and commonweales, and not a law established by the sovereignty of any prince"; DAVIS, *IMPOSITIONS* (written about 1600, first published 1656), c. 3: "The Law Merchant, as it is a part of the law of nature and Nations, is universal and one and the same in all countries of the world"; ZOUCHER, *supra* note 105, at 89, cites Davis, as above, and says it is clear from his words that "the causes concerning merchants are not now to be decided by the peculiar and ordinary laws of every country, but by the general law of nature and nations"; 1 BL. COMM. * 273: "The affairs of commerce are regulated by a law of their own called the Law Merchant or Lex Mercatoria, which all nations agree in and take notice of . . ."; Cf. also 4 *ibid.* * 67; Luke v. Lyde, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617 (1759), *per* Lord Mansfield: "Mercantile Law is not the law of a particular country, but the law of all nations."

²⁵⁵ *Supra* section II.

²⁵⁶ *Supra* section II.

²⁵⁷ Cf. Co. 1 INST., § 3, note, where Coke stated that there are "divers laws within the realm of England," and, proceeding to name them, put in the fourth class "the common law of England," and in the twelfth class "Lex Mercatoria, merchant, etc." See also 2 INST. 404. Cf. also Co. LITT., 182 (a): "The Law Merchant is part of the laws of this Realm."

²⁵⁸ *Supra* section III.

²⁵⁹ The first case upon a foreign bill of exchange in the common-law courts appears to be *Martin v. Bourne*, Cro. Jac. 7, 79 Eng. Rep. 6 (1603).

RASTELL'S, *ENTRIES* (written, according to 1 Cranch 375, 18 L. Ed. 142, in 1564) contain, fo. 338 (a), a declaration (of payee v. acceptor, on a foreign bill of exchange payable in England), in which the custom of merchants is *not* alleged as the foundation of the action, but the plaintiff bases his action upon defendant's promise to pay the amount of the bill, in consideration of 1,400 crowns paid to his use in France, in 37 Eliz. (1595), and in consideration that his *factor* had drawn and delivered the bills to the plaintiff's *factor*.

²⁶⁰ MALYNES, *op. cit.* *supra* note 254, had not yet noticed inland bills of exchange. CRANCH, *PROMISSORY NOTES*, 1 Cranch 386, 18 L. Ed. 147, also in 3 SEL. ESSAYS 83, states that the first case in the books clearly upon an inland bill is *Edgar v. Chut* (1663), also *sub nom.* *Chat v. Edgar*, 1 Keble 592, 636, 83 Eng. Rep. 1130, 1156 (1663). But 1 ROLLE, *ABRIDGMENT*, fo. 6 (44) reports a case of *Haste v. Taylor*, as holding that *by custom of London*, if merchant commorant in Middleborough and trafficking between Middleborough and London directs a bill of exchange on merchant commorant in London and trafficking between London and Middleborough, to be paid to another merchant or another, and if the merchant to whom it was directed subscribes it, this will be assumpt in law, "sur que un action sur le case gist." In *Buller v. Crips*, 6 Mod. 29, 87 Eng. Rep. 793 (1704), Holt, C.J., said he remembered "when actions on inland bills of exchange first began."

²⁶¹ Cf. 5 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1927) 145. Cf. *Peirson v. Pountney*, Yelvert. 135, 136, 80 Eng. Rep. 91 (1609): "The judges ought to take notice of that which is used amongst merchants for the maintenance of traffic." Cf. also *Van Heath v. Turner*, Winch 24, 124 Eng. Rep. 20 (1621), that "the custome of the mer-

chants is part of the Common Law of this kingdome, of which the judges ought to take notice, and if any doubt arise to them about their customs they may send for the merchants as to their custom, as they may send for the civilians to know their law."

Cf. BROOKE, ABRIDGEMENT, t. Customs, fo. 207 (b), pl. 59, reporting that 34 Hen. VIII (1542), held that a custom prevailing inter mercatores per totam Angliam was common law, and could, therefore, no more be pleaded than any other rule of the common law: "Information in Scaccario vers merchant pur lader vyne in estrange niece, le def. plede lycence par le roy fait a J.S. de ceo faire, quel J.S. aver graunt son auctorite inde al defendans, et quod habetur consuetudo inter mercatores p. totam Angliam q on poet assigne tyel licence ouster a un aut et q lassigne enjoyera ceo etc. q. fuit demurre in ley, et fuit agre pur ley, q home ne puit prescriber custome per totam Angl, que si soyt p totam Angliam, ceo est un commen ley et nemye un custome, contr si le custome ust estre plede d'estre in tyel citey ou countye. . . " *Cf. also Brook, NEW CASES, 56, 73 Eng. Rep. 871.*

Cf. Parker and Howard's Case, 3 Leon. 42, 74 Eng. Rep. 594 (1586), where the defendant pleaded a "custom of the realm of England," and Cook, for the plaintiff, argued that the plea was not good, "for the venire facias cannot be of the realm of England; also, if it be, through the whole realm of England, then the same is the common law . . . " "The Court was clear, that the judgment should be given for the plaintiff."

For local custom (*supra* note 260, *Haste v. Taylor, 1613*), *cf. Buller v. Crips (1704) supra* note 260, where Holt, C.J., said that he remembered a case of an inland bill of exchange, "and there they laid a particular custom between London and Bristol; and it was an action against the acceptor; the defendant's counsel would put them to prove the custom, at which Hale, Chief Justice, who tried it, laughed and said, they had a hopeful case of it." *Cf. also Carter v. Palmer, 12 Mod. 380, 88 Eng. Rep. 1393 (1702).*

²⁶² *Cf. Bromwich v. Lloyd, 2 Lutw. 1582, 1585, 125 Eng. Rep. 870, 872 (1699), per Treby, C.J.*

*Cf. Oaste v. Taylor, Cro. Jac. 306, 79 Eng. Rep. 262 (1613)—bill of exchange—verdict for plaintiff, motion in arrest of judgment because defendant not averred to be merchant; Barnaby v. Rigalt, Croke Car. 301, 79 Eng. Rep. 864 (1633)—bill of exchange—error assigned that action grounded on custom of merchants, but does not show that plaintiff was merchant: affirmed as plaintiff was named merchant in the declaration; Edgar v. Chut (1633), *supra* note 260, holding that bearer of the bill need not be a merchant, only drawer and drawee should be. *Cf. also Eggleschild's Case, Hetly 167 (1640).**

But *Woodward v. Rowe, 2 Keb. 132, 84 Eng. Rep. 84 (1666), held, per curiam: "The law of merchants is the law of the land, and the custom is good enough generally for any man without naming him merchant"; cf. Witherley v. Sarsfield, 1 Show. 125, 89 Eng. Rep. 491 (1690), upholding validity of a foreign bill of exchange drawn by a gentleman who is no trader. Cf. also Hodges v. Steward, 1 Salk. 125 (1691), same rule applied in case of an inland bill. The matter of bills of exchange was regulated by 9 & 10 Will. III, c. 17 (1699).*

Clerke v. Martin, 2 Ld. Raym. 757, 92 Eng. Rep. 6, 1 Salk. 129, 91 Eng. Rep. 122 (1702), per Holt, L.J., denied to promissory notes the privilege to be within custom of merchants, while admitting same for inland bills of exchange; but this was "overruled"

by 3 & 4 Ann. c. 9 (1705), which made promissory notes assignable or indorsable over as in case of inland bills of exchange.

²⁶³ *Cf.* *Magadara v. Hoit*, 1 Show. 318, 89 Eng. Rep. 597 (1691), holding that the law of merchants is *jus gentium* and the court is bound to take notice of it, and no allegation of a custom is needed. *Cf.* also *Williams v. Williams*, Carth. 269, 90 Eng. Rep. 759 (1694).

²⁶⁴ *Bromwich v. Lloyd* (1699), *supra* note 262, *per* Treby, C.J., at 1585, 872: "Et que ne besoigne fuit d'alleguer asc'customs, e ceo ne fuit deny per aucun de les autres Justices."

²⁶⁵ Already COKE, 2 INST. 58, declared that *Lex mercatoria* "is part of the Common Law." *Cf.* also *Van Heath v. Turner* (1621), *supra* note 261, *per* Hobart, C.J.: "The custom of merchants is part of the common law of this kingdom . . ." To the same effect, *Carter and Downish Case*, 3 Mod. Rep. 226, 87 Eng. Rep. 146 (1609), also in 1 Show. 127, 89 Eng. Rep. 492, Carth. 83, 90 Eng. Rep. 652. *Cf.* also *Williams v. Williams*, Carth. 268, 269, 90 Eng. Rep. 759, 760 (1694): "Custom of merchants concerning bills of exchange is part of the common law, of which the Judges will take notice *ex officio*"; *Edie v. East India Co.*, 2 Burr. 1216, 1226, 97 Eng. Rep. 801 (1761), *per* Foster, J.: "This custom of merchants is the general law of the kingdom, part of the common law, and therefore ought not to have been left to a jury after it had already been settled by judicial determination."

Cf. also *Pillans v. Van Mierop*, 3 Burr. 1664, 1669, 97 Eng. Rep. 1035, 1038 (1765), *per* Lord Mansfield: "The law of merchants and the law of the land is the same."

²⁶⁶ After he became, in 1756, chief justice of the King's Bench.

²⁶⁷ *Cf.* *Goodwin v. Roberts*, [1875] L. R. 10 Ex. 337, 346 *et seq.*

²⁶⁸ *Cf.* *Pillans v. Van Mierop*, 3 Burr. 1664, 97 Eng. Rep. 1035 (1765)—bill drawn from Ireland on Holland, reimbursed to drawee by draft credit on London, which was confirmed by London house, but later, after failure of Irish merchant, refused—held, action will lay for plaintiff on this credit, as promise to accept is, by the law of merchants, binding without consideration. Said Lord Mansfield (at 1672, 1040): "All nations ought to have their laws conformable to each other, on such commercial cases . . . (question is) whether by the law of nations such an engagement as this shall bind . . ."

²⁶⁹ *Barbuit's Case*, Cas. t. Talb. 281, 283 (1737), note to the case, 25 Eng. Rep. 777, 778 (diplomatic immunity): "... the law of nations (which in the fullest extent was and formed part of the law of England) was the rule of decision in cases of this kind." *Cf.* *Triquet v. Bath*, 3 Burr. 1478, 1479, 97 Eng. Rep. 936, 937 (1764), *per* Lord Mansfield: "Lord Talbot [in the *Barbuit's case*] declared a clear opinion 'That the law of nations in its full extent was part of the law of England' . . . I remember Lord Hardwicke's declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian Ambassador." Same case in 1 W. Black. 472, 96 Eng. Rep. 273. *Cf.* also *Darling v. Atkins*, 3 Wills. K. B. 33, 95 Eng. Rep. 917, 918 (1769): "*Curia*: To be sure Courts of law will protect the ambassadors . . . it is the law of nations . . ."

But the following cases of diplomatic immunity were decided on the strength of 7 Ann. c. 12 (1709) only, without any reference to rules of the law of nations: *Crosse v. Talbot*, 8 Mod. 288, 88 Eng. Rep. 205 (1724); *Wigmore v. Alvarez*, Fitz.G. 201, 94 Eng.

Rep. 719 (1731); *Seacombe v. Bowliney*, 1 Wills. K. B. 20, 95 Eng. Rep. 469 (1743); *Malachi Carolino's Case*, 1 Wills K. B. 78, 95 Eng. Rep. 502 (1744); *Poitier v. Croza*, 1 W. Black. 48, 96 Eng. Rep. 26 (1750); *Masters v. Manby*, 1 Burr. 400, 97 Eng. Rep. 320 (1751); *Lockwood v. Coysgain*, 3 Burr. 1675, 97 Eng. Rep. 1041 (1765); *Fontanier v. Heyl*, 3 Burr. 1731, 97 Eng. Rep. 1070 (1765).

²⁷⁰ 4 BL. COMM. (1765) c. 5, *67; *Heathfield v. Chilton*, 4 Burr. 2015, 98 Eng. Rep. 50 (1767), *per* Lord Mansfield: "The privileges of public ministers and their retinue depend upon the Law of Nations which is part of the common law of England."

Emperor of Austria v. Day and Kossuth, 2 Giff. Ch., 628, 678-679, 66 Eng. Rep. 263, 284 (1861), *per* Sir John Stuart, V. Ch.: "A public right, recognized by the Law of Nations, is a legal right; because the Law of Nations is part of the common law of England."

²⁷¹ *Cf.*, for example, *Emperor of Austria*, *supra* note 270, *per* V. Ch., at 678, 284: "It has always been held in our courts that the Law of Nations, wherever any question arises which is properly the object of its jurisdiction, is adopted in its full extent by the common law of England."

²⁷² *Cf.*, for example, *Engelke v. Musman*, [1928] A. C. 433, 449: "(International Law) formed part of the common law"; the Act of 7 Ann. c. 12 (1709), "for preserving the privileges of ambassadors . . .," declared "an ancient doctrine of the common law" (at 400); diplomatic privilege depends upon "principles of common law having their origin in the idea of the comity of nations" (at 458).

²⁷³ *Cf.*, for example, *West Rand Central Gold Mining Co. v. the King*, [1905] 2 K. B. 391, a question of responsibility of the British Crown for the debts of the annexed Transvaal republic. *Said Alverstone, C.J.*, at 407: "International Law will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of International Law may be relevant." Petition of right was denied.

²⁷⁴ *Cf.* *Parker and Howard's Case* (1586), *supra* note 261. *Cf.* as to actions based on local customs *supra* note 190. *Cf.* also argument of Jenkins (in 1660) before the House of Lords, 1 Wynne, *Life of Jenkins LXXXII*: "And pardon me, my Lords, if I say the judges of the common law cannot so easily and naturally take notice of the Marine law. There are so many terms and clauses (which are *vocabula artis* and *clausula juris*) in every contract, that it is very hard to make an English jury to understand them: not to speak of the differences there are among the civil writers themselves about the true meaning of them."

²⁷⁵ *Cranstown v. Johnston*, 3 Ves. 170, 183, 30 Eng. Rep. 952, 959 (1796), also 5 Ves. 277, 31 Eng. Rep. 586 (1800), *per* Sir R. Arden, M.R.: "This court cannot act upon the land directly, but upon the conscience of the person living here."

Cf. already *Carteret v. Petty*, 2 Swans. 324, 36 Eng. Rep. 639 (1676)—bill set forth that defendant bargained and sold to plaintiff moiety of certain lands in Ireland and that he there cut down woods and committed other waste, and so prayed an account, and a partition; defendant demurred because freehold and inheritance of lands in Ireland ought not to be settled here. Lord Nottingham "ordered him to answer as to the account, but allowed the demurrer as to the partition; for wheresoever the defendant may, by personal coercion, be compelled to perform the act decreed . . . the Court shall proceed to a decree . . . But all this is to be understood of such cases where the imprisonment of the person is the most proper means to effect that which is decreed to be done,

viz. the payment of money, making a conveyance, or the like. But where no obedience of the person imprisoned, or any act of his, can sufficiently execute a decree, there it is in vain to hold such a plea." Cf. also 1 Eq. CA. ANN. 133.

Cf. further *Arglasse v. Muschamp*, 1 Vern. 77, 23 Eng. Rep. 322 (1682), holding that court of equity in England will relieve against fraudulent conveyances of lands in Ireland, when defendant is in England; *Toller v. Carteret*, 2 Vern. 494, 23 Eng. Rep. 916 (1705), also *Anon.*, 1 Salk. 405, 91 Eng. Rep. 551 (1706), holding that bill may be brought in chancery to foreclose mortgage on lands out of the jurisdiction of the court, because "the Court acted against the person of the party and his conscience ... the party being here."

Cf. also *Archer v. Preston*, cited in *Arglasse v. Muschamp* (1682), *supra*, also 1 Eq. CA. ANN. 133, bill to be relieved against grant of annuity charged upon plaintiff's lands in Ireland, on ground that the said grant was obtained upon fraudulent practice "here in London"; plea to jurisdiction overruled; *Kildare v. Eustace*, 1 Kern. 419, 23 Eng. Rep. 559 (1686); *Angus v. Angus*, West temp. Hard. 23, 25 Eng. Rep. 800 (1737); *Foster v. Vassal*, 3 Atk. 589, 26 Eng. Rep. 1138 (1747).

²⁷⁶ *Penn v. Lord Baltimore*, 1 Ves. Sen. 444, 27 Eng. Rep. 1132 (1750), where specific performance was decreed of articles, executed in England, concerning boundaries of two provinces in America. Said the Chancellor at 447, 1134: "this bill ... is founded on articles executed in England under seal for mutual consideration, which gives jurisdiction to the King's courts both of law and equity whatever be the subject-matter."

Cf. also *Vernon v. Bethell*, 2 Eden 110, 28 Eng. Rep. 838 (1762); *White v. Hall*, 12 Ves. 324, 33 Eng. Rep. 123 (1806).

²⁷⁷ *Supra* notes 169, 170, 171.

²⁷⁸ *Supra* notes 179, 184.

²⁷⁹ *Supra* note 235, 2 Brownl. & Golds. 10, 17, 123 Eng. Rep. 786, 789.

²⁸⁰ *Slany & Clobery v. Ralph Cotton, Maldonado*, 2 Rolle 486, 81 Eng. Rep. 922 (1625): "Slany & Clobery sue R. C. M. esteant un Spaniard en le Admiral Court, quia il in Barbary assume a vener a Serborona in Barbary al Recumpra in Brasiel, & etc. fuit suggest, que le contract fuit fait in London, prohibition pria. . ."

²⁸¹ "Jones Justice dit, que ... le contract ... est sur le terre, & issint nest conuzance de le Admiral Court. Auxi fuit agree, que coment contract soit fait ouster le mere, que uncore assumpsit poet estre port icy supposant le contract in un lieu, etc. deins Angleterre in tiel county; ... & sur general issue fuit agree, que les leys de auter nations in tiel case poet estre admitt in evidence."

²⁸² *Tucker v. Capps & Jones*, 2 Rolle 497, 81 Eng. Rep. 940 (1625): "Capps & Jones & auters fueront jointment obligé al Tucker pur deliver 100,000 pound de sasafraise al value del' 10 l. le 100, que amount al 1000 l. le 100,000, & cest obligation fuit fait in Virginia in partibus maritimis que est le shore & donque ils dient a Tucker, que si il vaer al Bowyers Bay (un port la) que Tucker avera 40,000 de sasafraise la, sur que il va la, & la stay in retardationem de son voyage certaine moys, & Tucker sue in le Admiral Court & recover 30 l. damage, & sur ceo ... pria prohibition ..."

²⁸³ "Jones Justice dit, quant action est port icy per supposition, &c. nous judgeomus solonque le ley, lou in verety le fait fuit, come in le Common Banke fuit fait in le case d'un Doddridge, lou un deliver kersies destre vend in Spaine, le factor vend al un que devient bankrupt, & est un ley in Spaine, que si le factor enter ceo devant register, & ad testimonial que il serra discharge, nous judgeomus, auxi icy que serra discharge quacre."

Jones Justice dit, que quant action est port, &c. jeo ne perfectment aye prise ceo [confesses the reporter], quaere, jeo pute que les kersies fueront liver in Anglittere."

²⁸⁴ "Whitlock Justice le reason, pur que le Admiral Court ad jurisdiction de choses faits tous pais que in Anglittere est, quia tous pais sont govern per le civil ley, & pur ceo quia ne fuit reason, que le common ley judgera in tiels contracts, & choses queux fueront fait, lou auter ley fait per cest cause, & c, cest payment sur obligation nest plea in nostre ley, mes est in le civil ley."

²⁸⁵ "Dodridge Justice affirme que lour jurisdiction extend al terres de Virginia, mes si aucun parte del' contract soit icy destre performe, donques cest court avera jurisdiction, mes poet estre port icy al election del' plaintiff, coment que tout le contract surd in partibus transmarinis, s'il suppose le lieu destre in un county deins Anglittere."

Capp's Case, 2 Rolle 492, 81 Eng. Rep. 937 (1625), gives a different version of the opinions of the judges: "Jones Justice vous estis deceave. Whitlock Justice le plaintiff poet supposer le contract destre fait in Angleterre; & q fueront icy. Jones Justice, le plaintiff poet suer in le Admiral Court sil voet supposer le contract in Virginia, mes sil suppose le contract in Anglittere poet suer icy, mes si parte de le contract soit icy, & parte ouster le mere, in Virginia, ou sur le mere, le common ley solment avera jurisdiction, & ceux sont les voyer differences. Adjournatur."

²⁸⁶ Cf. Robinson v. Bland, 2 Burr. 1077, 97 Eng. Rep. 717 (1760)—contract made in France, performable in England—*per* Denison, J., at 1081, 729: "And the plaintiff has appealed to the laws of England by bringing his action here, and ought to be determined by them." Cf. also *infra* notes 331 and 332.

²⁸⁷ Printed in the first edition (only) of 1 Cro. Car. 296; also in PRYNN, *op. cit. supra* note 225, Ch. 22, p. 101; ZOUCHÉ, *op. cit. supra* note 105, 122. Cf. also 2 SEL. PLEAS ADMIR. XIV. Quotations given in text are taken from Zouche.

²⁸⁸ "Thirdly, if sute be in the Admiralty for building, amending, saving, or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm."

"Fourthly, although of some of causes arising upon the Thames beneath the Bridge, the King's Courts have conuzance, yet the Admiral ... also hath jurisdiction there ... he may try personal contracts, or injuries done there, which concern navigation upon the sea, and no prohibition is to be granted in such cases."

²⁸⁹ Cf. 2 WYNN, LIFE OF JENKINS, 747. In the second and following editions of Cro. Car., *supra* note 287, the arrangement of 1632 is stated not to be law.

Cf. Tasker v. Gale, ROLLE, ABRIDGMENT, fo. 533 (1634), in which case the arrangement seems to have been applied. Woodward v. Bonithan, Sir T. Raym. 3, 83 Eng. Rep. 2 (1661), relates that these resolutions had been denied by several judges and renounced even by some judges who had subscribed them. Cf. also Clinton v. Brig. Hannah, Bee 419, denying that the case of Tasker, *supra*, is good law.

²⁹⁰ Quoted in De Lovio v. Boit, 7 Fed. Cas. no. 3776, at 436 (C. Ct. D. Mass. 1815), from Hall's translation of Clerke, Prax. 24. The first section, after reciting the public inconvenience to trade through the "uncertainty of the jurisdiction in maritime causes," enacts "that the court of admiralty shall have cognizance and jurisdiction against the ship or vessel with the tackle, apparel and furniture thereof, in all causes which concern the repairing, victualling, and furnishing provisions, for the setting of such ships or vessels to sea; and in all cases of bottomry, and likewise in contracts made beyond the

seas concerning shipping or navigation, or damages happening thereon, or arising at sea in any voyage; and in all cases of charter-parties, or contracts for freight, bills of lading, or mariner's wages, or damages in goods laden on board ships, or other damages done by one ship or vessel to another, or by anchors or want of laying of buoys, except always that the said court of admiralty shall not hold pleas or admit actions upon any bills of exchange, or accounts betwixt merchant and merchant or their factors." (Italics supplied.) This ordinance was made perpetual by another in 1654, but it fell with the other acts of the Commonwealth upon the restoration of Charles II (1660).

²⁹¹ Cf. *Thomlinson's Case* (1605), *supra* in text to note 247.

²⁹² *Wier's case* (1607), 1 ROLLE, ABRIDGMENT 530, pl. 12: "... car ceo est per la ley de Nations que le Justice dun Nation, serra aidant al Justice d'auter Nation, & lun d'executer le judgment de l'auter: & la ley d'Engleterre prist notice de cest ley, & le Judge del ley Civilie est le proper Magistrate pur cest purpose, car il solment ad execution del ley Civil deins ces Reims." Cf. also VINER, ABRIDGMENT, t. Court of Admiralty 513; also 6 *ibid.*, 572, pl. 12; also 1 BACON, ABRIDGMENT, t. Court of Admiralty 629; cited as *Wilbred and Wyer's case* in 2 Kcb. 510, 610, 84 Eng. Rep. 320, 381.

²⁹³ Contrast this with the contemporaneous practice in France, where the Royal Ordinance of 1629, art. 121, declared that foreign judgments, for whatever cause, should not have any execution in France, and that, notwithstanding the judgments, Frenchmen against whom they might have been rendered should be enabled to have their rights discussed *de novo*. 2 WEISS, DROIT INTERNATIONAL PRIVÉ (1913) 12, 58.

²⁹⁴ By *Finch* (afterwards Lord Nottingham), with the approval of the court, in *Jurado v. Gregory*, 1 Ventris 32, 86 Eng. Rep. 23 (1670); also 1 Sid. 418, 82 Eng. Rep. 1191, 2 Keble 511, 84 Eng. Rep. 320, 1 Lev. 267, 83 Eng. Rep. 400. In this case a contract was made at Malaga concerning the lading of a ship, for breach of which there was libel in a foreign admiralty and sentence that cargo should be received into ship, which being refused another libel was commenced in admiralty in England—prohibition to admiralty was awarded, because suit in England was not on a complete sentence of a foreign admiralty (1 Vent. 32), "to pay anything for the nonperformance" (1 Lev. 267), but for breach of an award, that wine should be received, "which is in the nature of an original suit" (1 Vent. 32); besides, the judge there—"le Alcade nest come Admiralty icy" (1 Sid. 418).

²⁹⁵ *Hughs v. Cornelius et al.*, Sir T. Raym. 473, 83 Eng. Rep. 247 (1683), also 2 Show. K. B. 232, 89 Eng. Rep. 907.

Cf. also *Ewers v. Jones*, 2 Ld. Raym. 935, 92 Eng. Rep. 124 (1704), *per* Holt, C.J.: "The sentence of a civil law court in a foreign realm shall be executed in a court of the same nature here and proceeding after the same law, and no prohibition . . .," citing *Hugh's case*.

²⁹⁶ 2 Show. K. B. 232, 89 Eng. Rep. 907. Cf. also *Newland v. Horseman*, 1 Vern. 21, 23 Eng. Rep. 275 (1681), holding that sentence of a foreign court of admiralty is conclusive upon parties, and staying proceedings at law. Cf. also *Geyer v. Aguila*, 7 Term Rep. 680, 697, 101 Eng. Rep. 1196, 1205 (1798).

²⁹⁷ *Gold v. Canhan*, 2 Swans. 640, 36 Eng. Rep. 640 (1678-1679); 1 Ca. in Cha. 311.

²⁹⁸ *Cottingham's Case*, 2 Swans. 326, 36 Eng. Rep. 640 (1678).

²⁹⁹ *Burroughs v. Jamineau*, Mosely 1, 25 Eng. Rep. 235 (1726); 2 Strange 733, 93 Eng. Rep. 815.

³⁰⁰ 2 Strange 733, 93 Eng. Rep. 815. Cf. *Bottcher v. Lawson*, Cas. t. Hardw. 85, 89,

95 Eng. Rep. 53, 56 (1734), *per* Hardwicke, C.: "The reason gone upon by Lord Chancellor King in the case of Burroughs v. Jamineau, was certainly right, that where any court, whether foreign or domestic, that has the proper jurisdiction of the cases, makes a determination, it is conclusive to all other courts. . . ."

³⁰¹ This theory, usually called that of "comity," was supported also by Lord Hardwicke, *Roach v. Jarvan*, 1 Ves. Sr. 157, 159, 27 Eng. Rep. 954, 955 (1748), holding that marriage is "valid from being established by the sentence of a court in France having jurisdiction, and it is true that, if so, it is conclusive whether in a foreign court or not, from the law of nations in such cases, otherwise, the rights of mankind would be very precarious and uncertain"; by Lord Kenyon, *Galbraith v. Neville*, 1 Doug. 6, note, 99 Eng. Rep. 5 (1789); by Lord Chancellor Eldon, *Wright v. Simpson*, 6 Ves. 714, 730, 31 Eng. Rep. 1273, 1280 (1802); by Lord Ellenborough, *Alvers v. Bunbury*, 4 Camp. 29, 171 Eng. Rep. 10 (1814).

³⁰² *Russel v. Smyth*, J. M. & W. 810, 159 Eng. Rep. 343 (1842), *per* Parke, B.

³⁰³ So held already in *Dupleix v. DeRoven*, 2 Vern. 540, 23 Eng. Rep. 950 (1705), where one of two merchants in France recovered judgment there against the other for a sum of money, which not being paid, he brought suit in chancery in England for discovery of assets and satisfaction of debt, and defendant pleaded statute of limitations of six years, and prevailed, Lord Keeper Cowper saying: "Although the plaintiff obtained a judgment or sentence in France, yet here the debt must be considered as a debt by simple contract. The Plaintiff can maintain no action here but an *indebitatus assumpsit* or an *inimul comptassent*, so that the statute of limitations is pleadable in this case."

Cf. also *Gage v. Bulkeley*, Ridg. temp. Hardw., 270, 27 Eng. Rep. 826, 2 Ves. Sr. (Bell's Supp.) 409, 440, 28 Eng. Rep. 563, 571 (1744), *per* Lord Hardwicke: "You cannot in this Kingdom maintain debt upon judgment obtained for money in a foreign jurisdiction, but you may on *assumpsit* in nature of debt, upon a simple contract, and give the judgment in evidence. . . ." So also *Walker v. Witter*, 1 Doug. 1, 5, 99 Eng. Rep. 1, 4 (1778), *per* Lord Mansfield.

On the Continent foreign judgments are not treated as new causes of action, but are admitted to execution or declared executory after a special proceeding for that purpose. *Cf.*, *f. ex.*, France, CODE CIV. PROC., § 722.

In England, the JUDGMENTS EXTENSION ACT, 31 & 32 Vict. c. 54 (1868), provided for execution of judgments of courts of England, Ireland, and Scotland, in parts of the United Kingdom not subject to their jurisdiction, upon registration of a certificate in the court in whose territory execution is desired. The ADMINISTRATION OF JUSTICE ACT, 10 & 11 Geo. V, c. 81 (1920), provided for reciprocal enforcement, by registration, of judgments of courts in British Dominions outside the United Kingdom, in English, Scottish, and Irish courts, and *vice versa*, and the act of 23 Geo. V, c. 13 (1933), gave similar possibility to judgments of foreign countries.

³⁰⁴ Plaintiff is not bound to prove cause of action on which judgment was founded, *Sinclair v. Fraser*, 1 Doug. 4, n., 99 Eng. Rep. 9 (H. L. 1771); *Crawford v. Witten*, Loft 154, 98 Eng. Rep. 584 (1773), also *sub nom.* *Crawford v. Whitol*, 1 Doug. K. B. 4 n., 99 Eng. Rep. 2; *Walker v. Witter*, 1 Doug. 1, 99 Eng. Rep. 1 (1778).

Sinclair v. Fraser, *supra*, held that "it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly obtained"; *Galbraith v. Nevill*, 1 Doug. 6, n., 99 Eng. Rep. 5 (1789), *per* Buller, J.: "the foreign judgment shall be *prima facie* evidence of the debt, and conclusive till it be impeached by the other

party"; a later group of decisions held that foreign judgments are conclusive evidence, only examinable for irregularity, fraud, or lack of jurisdiction: *Martin v. Nicolls*, 3 Sim. 458, 57 Eng. Rep. 1070 (1830); *Tarleton v. Tarleton*, 4 M. B. S. 21, 105 Eng. Rep. 742 (1815); *Guinness v. Carroll*, 2 B. & Ad. 951, 109 Eng. Rep. 1396 (1830). To the same effect, *Henderson v. Henderson*, 6 Q. B. 287, 298, 115 Eng. Rep. 111 (1844); *Bank of Australasia v. Nias*, 16 Q. B. 717, 117 Eng. Rep. 1055 (1851).

³⁰⁵ As, for example, in Germany, CODE CIV. PROC., art. 328, (5), art. 661, (5); and in several other countries. For United States, *cf. Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139 (1895).

In some countries foreign judgments are enforced only in case of a treaty, for example, in Netherlands; so also in (Imperial) Russia, CODE CIV. PROC., arts. 1279, 1281; Senate, (1902) no. 62.

³⁰⁶ As, for example, in France ("revision au fond"), Cass., June 26, 1905, *Sirey* (1905) 1, 433, *cf. also* *Hilton v. Guyot*, *supra* note 305, but not in case there is a treaty.

³⁰⁷ *Pemberton v. Hughes*, [1899] 1 Ch. 781, at 790, *per* Lindley, M. R.: "English courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice . . . the jurisdiction which alone is important in these matters is the competence of the court in an international sense: i.e. its territorial competence over the subject matter and over the defendant."

³⁰⁸ *Cf. 2 HALE, H. C. L. 49-51*. In 14 Car. II (1661) a bill "for settling the jurisdiction of the Court of Admiralty" was considered by the House of Lords; in 22 Car. II (1669) another bill, "for declaring and ascertaining the jurisdiction of H. M.'s Court of Admiralty in marine cases," was read; but no further action was taken on either of them. *Cf. The Neptune*, Pr. C. 3 Knapp 102, 12 Eng. Rep. 587 (1835).

Cf. also *Jurado v. Gregory* (1670), *supra* note 294.

³⁰⁹ *Supra* note 73.

³¹⁰ *Supra* note 73. Henry VIII assumed the title of King of Ireland in 33 Hen. (1542), which was recognized by 35 Hen. VIII, c. 3 (1544); 39 & 40 Geo. III, c. 67 (1799), declared union of the Kingdoms of Great Britain and Ireland into one Kingdom.

³¹¹ *Cf. supra* note 73.

³¹² 39 & 40 Geo. III, c. 67 (1799).

³¹³ *Cf. 1 STEPHEN, COMMENT. ON LAWS OF ENGLAND*, 100 *et seq.*

³¹⁴ *Cf. Blankard v. Goldy*, 2 Salk. 411, 91 Eng. Rep. 356 (1693).

On the subject of extension *vel non* of the English law to newly acquired possessions, *cf. Dutton v. Howell, Shower (H.L.)* 24, 1 Eng. Rep. 17 (1693); *Anonym.*, 2 P. Wms. 75, 24 Eng. Rep. 646 (1722); *Smith v. Brown*, 2 Salk. 665, 91 Eng. Rep. 566; *Campbell v. Hall*, Lofft 653, 98 Eng. Rep. 848, Cowp. 204, 98 Eng. Rep. 1045 (1774); also 2 P. Wms. 75, 24 Eng. Rep. 646; also 20 STATE TRIALS 239; *Rex v. Vaughan*, 4 Burr. 2495, 2500, 98 Eng. Rep. 308, 311 (1769); *Atty. Gen. v. Stewart*, 2 Mer. 143, 35 Eng. Rep. 895 (1817).

³¹⁵ *Cf. cases, supra* note 314.

³¹⁶ *Cf. Mostyn v. Fabrigas* (1774), *supra* note 227, at 170, *per* Lord Mansfield: "In the supreme resort before the King in Council, the Privy Council determines all cases that arise in the plantations, in Gibraltar or Minorca, in Jersey, or Guernsey; and they inform themselves, by having the law stated to them." 7 & 8 Vict., c. 69 (1844), gave statutory recognition to the prerogative authority of the Council to hear appeals from any court of justice of the British colonies and possessions.

³¹⁷ 5 Ann., c. 8 (1707).

³¹⁸ *Ibid.*

³¹⁹ But in the *English* courts the law of Scotland continued to be treated as a foreign law, and as a question of fact to be ascertained by evidence. *Cf.* *Woodham v. Edwards*, 5 Ad. & Eccl. 77.

³²⁰ *Cf.* *Anandale v. Anandale*, 2 Ves. Sen. 384, 391, 28 Eng. Rep. 244, 276 (1751), *per* Lord Chancellor: "... as the union (between England and Scotland) already made has caused a greater intercourse than when divided and more frequent marriages and alliances, there happens to be such a communication of rights between the two kingdoms as makes this separation of the laws and jurisdiction of the courts attended with great inconvenience and difficulty: but we must have it as it now is."

³²¹ *Beven v. Clapham*, Lev. 143, 83 Eng. Rep. 339 (1664).

³²² *Blankard v. Goldy*, 2 Salk. 411, 91 Eng. Rep. 356 (1693), also 4 Mod. 215, 222, 87 Eng. Rep. 356, 359.

³²³ *Ranclaugh v. Champante*, 2 Vern. 395, 23 Eng. Rep. 855 (1700). But in *Precedents in Chancery* 128 (a), this case is reported as having held that the bond (made in England, sent over to Ireland, and money to be paid there, interest not stipulated) should carry Irish interest. *Cf.* also 2 Burr. 1084, 97 Eng. Rep. 721.

³²⁴ Eq. CA. Abr. 289.

³²⁵ "And several precedents were cited, as the case of Lane and Nichols, in which Turkish interest was allowed on a contract made there, tho' both parties had been long in England; so Indian interest was allowed on a contract made there between Harvey and the East India Company..."

³²⁶ *Cf.* *Ekins v. East-India Co.*, 1 P. Wms. 394, 24 Eng. Rep. 441 (1717)—ship and cargo wrongfully taken by defendant in the Indies, Indian interest allowed, deducting charge of the return—"let the master see what was the interest of money during these years in the Indies and what is the charge of returning money from the Indies to England..." The ground taken was that the defendant "must be presumed to have made the common advantage that money yields there."

Cf. also *Bourke v. Rickets*, 10 Ves. Jun. 330, 32 Eng. Rep. 872 (1804)—legacies in currency of Jamaica, where testator resided—held, legatees living in England not entitled to Jamaica interest.

Cf. *Wallis v. Brightwell*, 2 P. Wms. 87, 24 Eng. Rep. 652 (1722)—will made in England, annuity of eighty pounds per annum out of land in Ireland payable by trustee in England to wife of decedent for life—held, English, not Irish, money was intended. *Cf.* also *Saunders v. Drake*, 2 Atk. 465, 26 Eng. Rep. 681 (1742)—legacies by Jamaica testator—held, expressed in Jamaica currency and interest computed according to Jamaica rate; *Raymond v. Brodbelt*, 5 Ves. Jun. 199, 31 Eng. Rep. 545 (1800)—general legacy of a sum in Jamaica currency by a Jamaica testator, who remitted money to England—Jamaica interest decreed.

³²⁷ *Stapleton v. Conway*, 1 Ves. Sen. 427, 27 Eng. Rep. 1122; 3 Atk. 727, 26 Eng. Rep. 217 (1750)—sum of two thousand pounds being charged by settlement on an estate in West Indies—held, should bear English interest, as otherwise "that would be a method to evade the statutes of usury."

It was contended that "this being a sum of money to be raised out of an estate, it must be considered as coming out of a fund in that island, and to bear the rate of interest there, viz. 10 per cent for so much is the money worth there." The court

awarded, in its discretion, only five per cent interest, saying: "Where it has arisen by contract in America, by force of that contract, agreeable to the laws of those countries, the contract has been obliged to follow it. . . . But this is voluntary disposition by will or deed and nothing said about interest."

Cf. also *Connor v. Bellamont*, 2 Atk. 382, 26 Eng. Rep. 631 (1742)—debt contracted in London, bond for it taken in Ireland to be paid at 7 per cent—held, shall carry Irish interest.

In England such debts could only carry interest at five per cent. 14 Geo. III, c. 79 (1774), enacted that mortgages and securities executed in Great Britain upon property in Ireland or the colonies bearing interest not exceeding six per cent shall be valid and effectual.

³²⁸ *Foubert v. Turst*, 1 Brown Parliam. Cas. 129, 1 Eng. Rep. 464 (1703), also *sub nom.* *Feaubert and Trust*, Pre. Chan. 207, 24 Eng. Rep. 101 (1702).

Already in *Foubert v. De Cresseron*, Shower 194, 1 Eng. Rep. 130 (H. L. 1698)—will of a French woman, in French, made in London, leaving her estate to her (expected) child, "Si c'est sa volonté [of God] de donner des jours à mon enfant," and codicil, providing for bequests to others, "en cas qu'il plaise à Dieu de retirer mon enfant aussy bien que moy"; testatrix died a few hours after giving birth to the child who survived her by nearly two years; claim under codicil, question being whether provisions above meant "her child's death, as well as her own, in her lying in," or the child's death before "arrival to years of maturity or age enabling to dispose"—"the gentlemen of the Long Robe" of France, "now here in London," were asked to give "their construction of these words," and the chancellor, in accordance with their opinion, granted the claim, which was affirmed by the House of Lords.

Cf. also *Tremoult v. Dedire*, 1 P. Wms. 429, 24 Eng. Rep. 458 (1718), articles of marriage made in Holland, ruled that without proof court cannot take notice of foreign law. The report does not state whether the question involved was one of construction of the contract, or of application of foreign law.

³²⁹ *Smith v. Brown & Cooper*, 2 Salk. 665, 91 Eng. Rep. 566 (1706), also 2 Ld. Raym. 1274, 92 Eng. Rep. 338.

³³⁰ *Per* Holt, C.J., 2 Salk. 666, 91 Eng. Rep. 566. *Cf.* same case *sub nom.* *Smith v. Gould*, 2 Ld. Raym. 1275, 92 Eng. Rep. 338, *per totam curiam*: "there is no such thing as a slave by the law of England."

Cf., however, *Butts v. Penny*, 2 Lev. 201, 83 Eng. Rep. 518 (1678), holding that negroes being usually bought and sold among merchants as merchandise, and also being infidels, there might be a property in them sufficient to maintain trover. In 1729, it is reported, Sir Philip Yorke, attorney general (future Lord Hardwicke), and Talbot (then solicitor general) declared that a slave did not become free on coming to England, and in 1749 Lord Hardwicke reaffirmed his opinion of 1729 from the bench, *Pearne v. Lisle*, Ambler 76, 27 Eng. Rep. 48; *cf.* also *Somerset v. Stewart*, Loft 1, 8, 98 Eng. Rep. 499, 503 (1772). Lord Stowell, *The Slave Grace*, 2 Hagg. 94, 105, 166 Eng. Rep. 179, 183 (1827), said that slaves were sold in London on the "Exchange with as little reserve as they would have been in any of our West India possessions," and such a state of things continued without impeachment to nearly the end of the eighteenth century.

But *Chamberlayne and Perrin*, Loft 4, 98 Eng. Rep. 501 (1692), held trover for a negro would not lie. *Shanley v. Harvey*, 2 Eden 126, 28 Eng. Rep. 844 (1762), *per* Northington, chancellor: "As soon as man sets foot on English ground he is free: a

negro may maintain an action against his master for ill usage, and may have a habeas corpus if restrained of his liberty." To the same effect, *Somerset v. Stewart* (1772), *supra*, per Lord Mansfield, and *Chamberline v. Harvey*, 5 Mod. 182, 87 Eng. Rep. 596 (1796).

The disagreement was probably due to the conflict between the common law of England, and its legislation and policy toward its colonies. In the *Chamberline* case (1796), *supra*, it was held (190,600) that the law of Barbadoes, by which slaves are real estate, "is only *lex loci*, and extends only to that country, so long as he is occupied in service on that plantation."

Cf. also *Forbes v. Cochrane*, 2 B. & C. 448, 107 Eng. Rep. 450 (1824).

³³¹ *Robinson v. Bland* (1760). The quotations in text are taken, the first from W. Bl. 234, 256, the second from 2 Burrow 1077, 97 Eng. Rep. 717.

Cf. *Pond v. King*, 1 Wils. K. B. 191, 95 Eng. Rep. 567 (1747)—ship insured for a voyage of three months, taken by enemy during that time, but, before she is carried *infra praesidia hostis*, retaken by an Englishman—held, by common law, to be a total loss to the insured. Said Lee, C.J.: "Although by the civil law perhaps it may not be adjudged a total loss, yet the rules of that law are not to govern us, but we must give our judgment according to the Common Law of England, and upon this agreement between the parties, whose intentions appear, and must guide us . . ." The case of *Depiba* and *Ludlow*, . . . [1719], before Lord King, is almost a case in point, and that case he said he was bound to determine according to the common law and the meaning of the parties." (Italics supplied.)

³³² *Denison, J., id.* at 1081-2, 719: "And the plaintiff has appealed to the laws of England by bringing his action here, and ought to be determined by them"; *Wilmot, J.*, at 1084, 721: "I cannot help thinking, that where a person appeals to the law of England, he must take his remedy according to the law of England, to which he has appealed. . . . If a man originally appeals to the law of England for redress, he must have his redress according to that law to which he has appealed for such redress. Therefore, if this rule of determination was different, by the law of France, from our rule here, yet I should incline that the law of England, where the action was brought, should prevail against the law of France, if they did really clash with each other; because the party securing redress has chosen to apply here."

³³³ *Blad's Case*, 3 Swans. 603, 36 Eng. Rep. 991 (Privy Council 1673); *Blad v. Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992 (Chanc. 1674).

³³⁴ *Lord Bellamont's Case*, 2 Sal. 625, 651, 91 Eng. Rep. 529 (1700). In the same year a statute was passed, 12 Will. III, c. 6, which made governors abroad amenable in criminal cases to the jurisdiction of the courts in England.

In *Dutton v. Howell*, Shower 24, 1 Eng. Rep. 17 (H. L. 1693)—imprisonment by governor of Barbadoes—it was urged that "action cannot lie, because the Fact is not triable here; the Laws there may be different from ours" (27, 19), but it was answered that "the justification of such a Tort or Wrong ought to be according to the Common Law of England, for that Barbadoes is under the same Law as England," and that "the Common Law must and doth oblige there, for 'tis a Plantation or new settlement of Englishmen by the King's consent in an uninhabited country." Cf., as to that, *supra* note 314. Judgment in B. R. for defendant was reversed.

42 Geo. III, c. 85, § 6 (1802), extended provisions of 21 Jac. I, c. 12, (1624), *supra* note 190, with regard to venue, to all persons in public employment, and provided that

in actions upon case, in trespass, battery, or false imprisonment, for an act done *out of the kingdom*, the plaintiff may lay such act to have been done in Westminster or in any county where the defendant shall reside.

³³⁵ *Rafael v. Verelst*, 2 W. Black. 983, 96 Eng. Rep. 579 (1774); 2 W. Black. 1055, 1067, 96 Eng. Rep. 620, 628 (1776); 1 Cowp. 425, 98 Eng. Rep. 1166.

³³⁶ *Mostyn v. Fabrigas*, 1 Cowp. 161, 98 Eng. Rep. 1021 (1774). Minorca was ceded to Great Britain by the treaty of Utrecht (1712).

³³⁷ *Cf.* also *Mostyn v. Fabrigas*, *supra* note 336, at 166, 98 Eng. Rep. at 1024: "Captain Parker brought an action of trespass and false imprisonment against Lord Clive for injuries received in India, and it was never doubted but that the action did lie." *Cf. id.* at 174, *per* Lord Mansfield: "There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor, injuring a man contrary to the duty of his office and in violation of the trust reposed in him by the King's Commission."

³³⁸ 1 Cowp. 170, 174, *per* Lord Mansfield: "... it is objected supposing the defendant to have acted as the Spanish governor was empowered to do before, how is it to be known ... the way of knowing foreign laws is by admitting them to be proved as facts, and the Court must assist the jury in ascertaining what the law is. ..."

Cf. also, *Wey v. Rally*, 6 Mod. 194, 87 Eng. Rep. 948 (1705), *per* Powell, J.: "... an action of false imprisonment has been brought here against a governor of Jamaica for an imprisonment there, and the laws of the country given in evidence ..."

³³⁹ 1 Cowp., at 164, 98 Eng. Rep., at 1023.

³⁴⁰ *The Halley*, [1867] 2 P. C. 193, 202; *Phillips v. Eyre*, [1870] L. R. 6 Q. B. 1, 28.

³⁴¹ *Machado v. Fontes*, [1897] 2 Q. B. 231. In *Mostyn v. Fabrigas* [1774], *supra* note 336, it was argued, by counsel for plaintiffs, that "where an act is done, as in this case, which by the law of England would be a crime, but in the country where it is committed, is no crime at all, the *lex loci* cannot be the rule," citing *Pons v. Johnson*, and *Ballister v. Johnson*, cases decided in 1765.

Cf. also *Mure v. Kaye*, 4 Taunt. 33, 128 Eng. Rep. 239 (1811)—action of false imprisonment in Scotland, on suspicion of felony committed in England—holding pleas were not sufficient, where two queries were raised by the court, "whether the defendant must shew that the law of Scotland, as well as the law of England warranted such arrest," and "whether it does not lie on the plaintiff suing in England to reply that by the law of Scotland the arrest was not warranted, though if made in England would be warranted."

³⁴² *Cf.* *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918), *per* Cardozo, J.: "That is certainly not the rule with us. ... We are not so provincial. ..."

³⁴³ *Skinner v. East India Co.*, 6 HOWELL'S STATE TRIALS 710-719 (1665), also mentioned in *Mostyn v. Fabrigas*, *supra* note 336. In 1657, when trade was opened to the East Indies, Skinner possessed himself of a house and warehouse, which he filled with goods at Jamby, and he purchased of king at Great Jamby, islands of Baretha; his ship, goods, and papers were taken away and spoiled; and he was assaulted and wounded, and his house and islands were entered and taken possession of; upon this case question was propounded to twelve judges by an order from the king in Council and they gave the answer that these actions could not be tried in England. It was said, however, that courts of justice at Westminster can give relief for personal injuries and for injury to personal property.

³⁴⁴ *Shelling v. Farmer*, at Guildhall *coram* Eyre C. J. de C. B., 1 *Strange* 646, 93 Eng. Rep. 756 (1726)—seizing house in East Indies—held, not triable in England.

³⁴⁵ *Mostyn v. Fabrigas*, *supra* note 336, at 180, case of Captain Gambier—pulling down of houses of some settlers on coast of Nova Scotia, who supplied the navy and sailors with spirituous liquors; case of Admiral Palliser—destroying fishing huts upon the Labrador coast erected by the Canadians too early in the season. "There are no local courts among the Esquimaux Indians upon that part of the Labrador Coast."

³⁴⁶ *Doulson v. Matthews*, 4 Term R. 503, 100 Eng. Rep. 1143 (1792).

³⁴⁷ *Supra* note 212.

³⁴⁸ *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602, 624.

³⁴⁹ *Cf.* already *Holding and Haling Case*, 3 Keble 150, 84 Eng. Rep. 646 (1674), debt for rent on land in Ireland—defendant pleaded that Duke of York was seized in fee and entered and ousted defendant, which plaintiff denied; defendant demurred, and for cause shows *non bene conclusit*. "Hales, C.J., conceived this must be tried in Ireland . . . but no special cause being set down. . . . Judgment for the plaintiff, nisi."

Shower, as counsel in *Barker v. Dormer*, *infra* note 350, 1 Shaw. 192, 197, 89 Eng. Rep. 531, 534, said, that in *Holding case* "all were of opinion that this Court had a means of trying it, and so gave judgment for the plaintiff."

³⁵⁰ *Barker v. Damer*, *Carthew* 182, 90 Eng. Rep. 710 (1691), 1 Salk. 80, 91 Eng. Rep. 76, 3 Mod. 336, 87 Eng. Rep. 223; *sub nom.* *Barker v. Dormer*, 1 Show. 187, 89 Eng. Rep. 527. *Per Holt, C.J.*, 1 Show. 199, 89 Eng. Rep. 535: "It is true that the privity of contract between grantor of reversion and the lessee is assigned to the grantee, by the St. of 32 Hen. 8, c. 37, but the assignee of the lessee remains as he was at common law." Shower, as counsel, argued: "Though in respect of counties in England the land will draw the cause, yet it does not follow that it will do so in case of another nation."

³⁵¹ *Wey v. Rally*, 6 Mod. 194, 87 Eng. Rep. 948 (1705); 2 Salk. 651, 91 Eng. Rep. 554; 3 Salk. 381, 91 Eng. Rep. 885; *Holt (K. B.)* 705, 90 Eng. Rep. 1289.

³⁵² "And this we see every day done before committees of appeals from thence." 6 Mod. Rep. at 195, 87 Eng. Rep. at 948. *Cf. supra* note 316.

³⁵³ *Cf. Whitaker v. Forbes*, (C. A. 1875) L. Rep. 1 C. P. Div. 51—action of debt for arrears of a rent charge upon lands situated in Australia. Said Lord Cairns, C.: "I do not think that we can depart from a rule which has been so long regarded as settled by the authorities . . . and which have never since been departed from. It was suggested . . . that though that might be the law with regard to cases where the land was situated in England, when the land was out of England the same rule would not apply, and the venue would cease to be local. I cannot find any ground for such a proposition either in principle or on authority. The principle of the decisions seems to be, that when the venue is local the case must be tried by a jury from the place where the venue is laid, and if no such jury can be summoned the principle would seem equally to show that the case cannot be tried in England at all. Sitting in a court of error, I think that we are bound by the authorities, although possibly it might be convenient that the action should lie under such circumstances as exist in the present case." This case was commenced before the Judicature Acts, *supra* note 212, came into operation. *Cf. Buenos Ayres etc. Ry. v. Northern Ry. Co.*, (1877) 2 Q. B. 210, upholding action for rent of railway station in Buenos Aires, where defendant "disclaimed any intention of arguing the case on any technical ground of venue" (211). *Cf. also British South Africa Co. case, supra* note 348.

³⁵⁴ Pike v. Hoare, Amb. 426, 27 Eng. Rep. 286 (1763).

³⁵⁵ *Ibid.*: "In Penn v. Lord Baltimore [*supra* note 276] Lord Hardwicke made the distinction and said, 'It was the contract that gave the Court jurisdiction in that case, the principles of equity being the same in all places.'"

³⁵⁶ Brown v. Hedges, cited in 1 Str. 612, 193 Eng. Rep. 733 (1709).

³⁵⁷ Cf. *supra* notes 179, 184.

^{357a} Anon., 9 Mod. 66 (1723), also (*semble*) same case *sub nom.* Bowman v. Reeve, (1721) Pre. Chan. 577. Said Lord Chancellor: "The executor or the residuary legatee shall be obliged in equity to make them a recompense; for they are to have nothing to their own use but the residue, after the debts and legacies paid, and this residuum is chargeable with the debts." The syllabus makes a reference to Foubert v. Turst (1703), *supra* note 328—case of a marriage contract—which was treated as "by no means" involving "an attempt to introduce foreign laws." Cf. also 9 Mod. 67, 88 Eng. Rep. 320: "... by the laws of Holland, all debts shall affect the real estate there; but it is there, as it is here, that the personal estate shall come in aid of the real estate, and be charged in the first place..." (Italics supplied.)

³⁵⁸ Pipon v. Pipon, Amb. 26, 27 Eng. Rep. 14 (1744), also Amb. 799, 27 Eng. Rep. 507; bill for distribution of property in England, according to statute Car. II, *supra* note 27; bill dismissed. Hardwicke construed the English statute as not having been intended to be applied in such a case, Amb. 26, 27 Eng. Rep. 14: "The words of the statute are very particular, viz. the residue undisposed of is to be distributed, so that the plaintiffs are wrong in coming into this court, for an account must be decreed of the whole, and the general administrator is not before the Court." Cf. also Amb. 508, 27 Eng. Rep. 800: "The general administrator is not before the Court. How can I decree an account of the whole estate; and without it I cannot find out the residue." Cf. also in 9 Mod. 431, 88 Eng. Rep. 554.

³⁵⁹ Thorne v. Watkins, 2 Ves. Sr. 35, 28 Eng. Rep. 24 (1750). Cf. also Saunders v. Drake, 2 Atk. 465, 26 Eng. Rep. 681 (1742); Burn v. Cole, Amb. 415, 27 Eng. Rep. 277 (1762); Bempde v. Johnstone, 3 Ves. Jr. 198, 30 Eng. Rep. 966 (1796); Somerville v. Somerville, 5 Ves. Jr. 750, 31 Eng. Rep. 839 (1801).

³⁶⁰ Solomons v. Ross (1764); Jollet v. Deponthieu (1769); note in 1 H. Bl. 130, 132, 126 Eng. Rep. 79.

When a creditor of an English bankrupt attached property of his debtor in Scotland, Gibraltar, Rhode Island, it was held that other creditors, or assignees, of the debtor could not recover from such a creditor: Wilson's case (Lord Hardwicke), Waring v. Knight (Lord Mansfield), Mawdesley v. Parke and Beckwith (1770), quoted in 1 H. Bl. 678, 680, 693, 126 Eng. Rep. 392, 393, 395; "for our bankrupt laws were not in force there" (Hardwicke, Mansfield); because the money was recovered by a sentence in a foreign court where the debtor was (Mansfield). But in 1791, Hunter v. Potts, 4 Term Rep. 182, 100 Eng. Rep. 962, *aff'd in* Phillips v. Hunter, 2 H. Bl. 402, 126 Eng. Rep. 618, it was decided that if a creditor, residing in England, attaches property of an English bankrupt abroad, the assignees in bankruptcy may recover from him in an action for money received to their use. Cf. also Sill v. Warswick, 1 H. Bl. 665, 126 Eng. Rep. 399 (1791).

As to who is subject to the English bankrupt laws (13 Eliz. c. 7, 1571; 1 Jac. 1, c. 15, 1603; 21 Jac. 1, c. 19, 1624), cf. Dodsworth v. Anderson, Jones, T. 141, 84 Eng. Rep. 218 (1680); Bird v. Sedgwick, 1 Salk. 110, 91 Eng. Rep. 100 (1694); *Ex parte* William-

son, 2 Ves. Sen. 250, 28 Eng. Rep. 161 (1751); *Alexander v. Vaughan*, 1 Cowp. 397, 98 Eng. Rep. 1151 (1776).

³⁶² *Roach v. Jarvan* (1748), *supra* note 301. Already *Alsop v. Bowtrell*, Cro. Jac. 541, 79 Eng. Rep. 464 (1620)—marriage at Utrecht beyond sea, "certified under the seal of the minister there, and of the said town, and that they cohabited for two years together as man and wife"—held, was a sufficient proof that they were married.

³⁶³ *Scrimshire v. Scrimshire*, 2 Hag. Cons. 395, 161 Eng. Rep. 782 (1752). Judgment in this case "was founded on great deliberation, and Lord Chancellor Hardwicke was consulted on it"; *cf.* *Middleton v. Janverin*, 2 Hag. Cons. 436, 446, 161 Eng. Rep. 797 (1802). *Cf.* to the same effect *Butler v. Freeman*, Amb. 302, 27 Eng. Rep. 204 (1756).

³⁶⁴ At 408, 787: "By the general law, all parties contracting gain a forum in the place where the contract is entered into. All our books lay this down for law: it is needless at present to mention more than one. Gayll, lib. 2, obs. 123. . . ."

Note that the statement above speaks of gaining a (judicial) *forum* in the *locus celebrationis*, and that "our books" dealt with questions of giving effect to judgments of such a *forum*. *Cf. supra* notes 294 *et seq.*

³⁶⁴ At 416, 790.

³⁶⁵ At 402, 785: "In matrimonial causes all laws take notice of the law of other countries . . ." At 407, 787: "I apprehend that it is the law of this country to take notice of the laws of France, or any foreign country, in determining upon marriages of this kind." At 420, 421; 790, 791: "From the doctrine laid down in our books—the practice of nations—and the mischief and confusion that would arise . . . from a contrary doctrine, I may infer that it is the consent of all nations that it is the *jus gentium*, that . . . contracts of this kind are to be determined by the laws of the country where they are made . . . The *jus gentium* is the law of every country and is obligatory on the subjects of every country. Every country takes notice of it; and this court observing that law, in determining upon this case, cannot be said to determine English rights by the laws of France, but by the law of England, of which the *jus gentium* is part . . . as the law of England takes notice of the law of nations in commercial and maritime affairs; because all countries are interested in those questions; and as all countries are equally interested to have matrimonial questions determined by the laws of the country where they are had, and the mischief would be infinite to the subjects of all nations if it was not so, I am of opinion that this is the *jus gentium* of which this and all courts are to take notice."

³⁶⁶ *Holman v. Johnson*, 1 Cowp. 341, 344, 98 Eng. Rep. 1120, 1121 (1775).

³⁶⁷ *Dalrymple v. Dalrymple*, 2 Hag. Con. 54, 161 Eng. Rep. 665 (1811)—validity of marriage by contract without religious celebration, in Scotland—held (by the law of Scotland), valid.

³⁶⁸ *Cf. Corset v. Husely*, Holt K. B. 48, 90 Eng. Rep. 924 (1689), also in 1 Salk. 34, 91 Eng. Rep. 36, *sub nom.* *Croastwick v. Lowseley*; *Johnson v. Shippin*, 1 Salk. 35, 91, Eng. Rep. (1704), 2 Ld. Raym. 984, 92 Eng. Rep. 155, Holt K. B. 49, 90 Eng. Rep. 925, *supra* note 154.

Cf. also *Lister v. Baxter*, 2 Str. 695, 93 Eng. Rep. 789 (1726)—master of ship that was in distress at sea put in at Amsterdam and there borrowed sixty pounds to repair ship and hypothecated it for repayment of money—money not being paid, creditor libeled in admiralty; prohibition was asked on account of its being a contract at land, but was denied, it appearing by libel ship was upon her voyage.

Cf. also *Menetone v. Gibbons*, 3 Term Rep. 268, 100 Eng. Rep. 568 (1789)—hypoth-

ecation bond made under seal, given on land at Cork, in Ireland, in course of voyage from London to various parts beyond the seas, and thence back to London—held, admiralty has jurisdiction. *Cf. supra* note 154. *Cf. also* *Clay v. Snelgrave*, 12 Mod. Rep. 406, 88 Eng. Rep. 1411 (1701).

²⁹⁶ *Cf. Coke v. Cretchett*, 3 Lev. 60, 83 Eng. Rep. 576 (1683); *Edmondson v. Walker*, 1 Show. 177, 89 Eng. Rep. 522 (1691); *Opie v. Child*, 1 Salk. 31, 93 Eng. Rep. 33 (1694); *Hook v. Moretan*, 1d. Raym. 398, 91 Eng. Rep. 1165 (1699); *cf. also* 4 Ann., c. 16, § 17 (1706); but not for wages of the master, *cf. Clay v. Sudgrave*, and *Bayly v. Grant*, 1 Salk. 33, 91 Eng. Rep. 34 (1701); 1 Ld. Raym. 576, 632, 91 Eng. Rep. 1285; *also Clay v. Snelgrave*, Carth. 518, 90 Eng. Rep. 896 (1701); 12 Mod. Rep. 405, 88 Eng. Rep. 1411; *Holt, K. B.* 595, 90 Eng. Rep. 1229. But mate may sue for wages in admiralty because he is like mariner, *Bayly v. Grant*, *Holt K. B.* 49, 90 Eng. Rep. 925 (1701).

²⁹⁷ *Cf. supra* notes 292, 294. That admiralty had exclusive jurisdiction of matters of prize, *cf. Le Caux v. Eden*, 2 Doug. 595, 99 Eng. Rep. 375 (1781); *Lindo v. Rodney*, 2 Doug. 613, 99 Eng. Rep. 385 (1783); *also Mitchell v. Rodney*, 2 Brown 423, 1 Eng. Rep. 1039 (1783); *Smart v. Wolff*, 3 Term Rep. 324, 100 Eng. Rep. 600 (1789); *Lord Camden v. Home*, 4 Term Rep. 383, 100 Eng. Rep. 1076 (1791). *Cf. also supra* notes 180, 181. Prior to the Naval Prize Act, 27-28 Vict. c. 25 (1864), prize jurisdiction was exercised by the admiralty by virtue of commissions issued by the Crown at the commencement of each war.

²⁹⁸ *Cf.*, however, letters patent to Sir Thomas Salusbury (1752), appointing him Judge of the Admiralty Court, Burrell 345, 167 Eng. Rep. 602: "... and we do hereby commit and grant to you ... our power and authority to take cognizance hear determine and examine all causes civil and maritime, also ... between any other persons whatsoever made begun or contracted for any thing matter cause or business or injury whatsoever done or to be done as well in upon or by the sea ... or upon any of the shores ..., from any of the first bridges towards the sea through England ... or elsewhere beyond the seas ..., and also complaints of ... contracts ... causes civil and maritime contracted or to be performed beyond the seas and within England. ..." (Italics supplied.)

²⁹⁹ *Cf. Luke v. Lyde*, 2 Burr. 882, 97 Eng. Rep. 614 (1759), *per* Lord Mansfield: "... the maritime law is not the law of a particular country, but the general law of nations: non erit alia lex Romae, alia Athenis; alia nunc, alia posthac sed et apud omnes gentes et omni tempore, una eademque lex obtinebit."

In prize matters the doctrine was firmly established that the admiralty court administers the law of nations. *Cf. The Maria*, 1 Ch. Robinson 340, 350, 165 Eng. Rep. 199, 202 (1799), *per* Sir William Scott: "... the duty of my station calls for from me ... to administer ... that justice which the law of nations holds out without distinction ..."; *The Walsingham Packet*, 2 Ch. Robins. 77, 82, 165 Eng. Rep. 244, 246 (1799): "This court is properly and directly a court of the law of nations only, and not intended to carry into effect the municipal law of this or any other country"; *The Recovery*, 6 Ch. Robins. 341, 348, 165 Eng. Rep. 955, 958 (1807): "This is a court of the Law of Nations, though sitting here under the authority of the King of Great Britain ... what foreigners have a right to demand from it is the administration of the Law of Nations, simply, and exclusively of principles borrowed from our own municipal jurisprudence. ..." *Cf.*, however, *The Fox*, 1 Edwards 311 (1811). *Cf. for* modern times, *The Alwina*, 34 T.L.R. 199 (1916); *The Stigstad*, [1916] Prob. 123 and [1919] A.C. 279; *The Leonora*, [1918] Prob. 182, and [1919] A.C. 974; *The Zamora*, [1916] 2 A.C. 77.

³⁰⁰ *Cf. Neptune*, 3 Hagg. 130, 135, 166 Eng. Rep. 354, 356 (1834), *per* Sir John

Nicholl; "The Court of Admiralty . . . must decide the question according to that law by which the Court is governed; for it is not competent to the Court and it has not jurisdiction to administer any other law than its own. Generally, then, the Court of Admiralty is governed by the civil law, the law marine, and the law merchant. . ."

³⁷⁴ Cf. *The Two Friends*, 1 Ch. Robins. 271, 165 Eng. Rep. 174 (1799)—salvage of American ship taken by French on high seas, rescued by her crew, carried to England, and labeled for salvage—jurisdiction was entertained because, *per* Sir William Scott, 279, 177, "Salvage is a question of *jus gentium*, and materially different from the question of a mariner's contract, which is a creature of the particular institution of the country, to be applied and construed and explained by its own particular rules." Cf., however, *The Golubchick*, 1 W. Rob. 143, 166 Eng. Rep. 526 (1840), holding that admiralty court can entertain suit for wages by foreign seamen, and that consent of foreign minister is not essential.

The Johann Friedrich, 1 W. Rob. 35, 37, 166 Eng. Rep. 486, 487 (1839)—collision on high seas, between Danish and Bremen ship, libel against Bremen ship—jurisdiction retained, Dr. Lushington saying: "All questions of collision are questions *communis juris*. . ." Cf. also the following collision cases: *The Dumfries*, 1 Swabey 63, 166 Eng. Rep. 1021 (1856); *The Zollverein*, 1 Swabey 96, 166 Eng. Rep. 1028 (1856); *The Griefswald*, 1 Swabey 430, 166 Eng. Rep. 1200 (1859).

Cf. also cases of bottomry bonds abroad, *The Alexander*, 1 Dods. 278, 165 Eng. Rep. 1310 (1812); *The Augusta*, 1 Dods. 283, 165 Eng. Rep. 1312 (1813). Cf. also *The Gratitude*, 3 Ch. Robins. 240 (1801), question of power of master of ship to hypothecate cargo for repairs of ship in a foreign port.

³⁷⁵ Cf. *the Johann & Siegmund, Niegel*, Edw. Adm. 242, 165 Eng. Rep. 1096 (1810)—Hamburg ship arrested in port of Plymouth at suit of persons, all of Hamburg, owners of fifteen sixteenth shares of ship on cause of possession against master, also of Hamburg, and owner of remaining one sixteenth part—Sir William Scott refused to entertain this suit, saying: "The court . . . certainly does hold plea of causes between foreigners arising on the *jus gentium*; but this, I think, is a case which cannot be so considered because whatever may have been the general rule under the old civil law in cases of possession, it has been variously modified by the municipal law of different countries; . . . the right of possession has not been left to depend upon the general maritime law of nations. . ."

In *the See Reuter*, 1 Dods. 22, 165 Eng. Rep. 1219 (1811), court was asked to enforce decree ordering master of ship to deliver up possession of vessel, which decree had been issued by court of country to which ship belonged. The decree was enforced, but it was said that the Court was "very unwilling to enter upon such questions . . . unless . . . by the intervention of the representative of the foreign state, devolving jurisdiction of his own country on this court." Cf. also *Madonna d'Ibra*, 1 Dods. 37, 41, 165 Eng. Rep. 1224, 1225 (1811).

By 3 & 4 Vict., c. 65 (1840), admiralty was given jurisdiction to decide questions of title and ownership of vessels, arising in causes of possession, salvage, damage, wages, or bottomry (§ 4), as well as cases of mortgages (§ 3). Cf. *the Foritude*, 2 W. Rob. 217, 166 Eng. Rep. 736 (1843). Cf. also *The Johanness Christoff*, 2 Spinks Adm. 93, 164 Eng. Rep. 325 (1854).

In *Ida, Lush*, 6, 167 Eng. Rep. 3 (1860)—master of Danish schooner lying at port of Ibraila in Danube, got on board English barque lying outside him, and with a view

to getting schooner out, wilfully cut barque adrift from her moorings, whereby she swung to stream, and capsized barge containing cargo which belonged to Turkish owners; action by owners against Danish schooner—Dr. Lushington declined to entertain the case on two grounds: *ratione loci*—"The court will not exercise jurisdiction over a foreign river"; and *ratione delicti*—"The court has jurisdiction over causes of collision, but not over damage generally" ("and this is no collision in the proper sense of the term"). Cf. *infra* note 378.

³⁷⁶ Segredo, otherwise Eliza Cornish, 1 Sp. Ecc. Ad. 37, 164 Eng. Rep. 22 (1853). Said Dr. Lushington, at 45, 27: "The law which I must seek to administer ... is the law maritime ... It is the law which generally is practiced by maritime nations ... and I must not deviate therefrom by introducing the English municipal law ... I am equally prohibited from giving effect to the law of the island of Fayal, unless it accords with the general maritime law; or in other words, unless ... the *lex loci contractus* is a part of the general maritime law, or ought to be imported ... for special reasons into this cause." Compare this with the doctrine laid down in *Scrimshire v. Scrimshire* (1752), *supra* note 365. Dr. Lushington also said, at 59-60, 35: "... if this case had come under the consideration of courts of Common Law ... they would have looked to ... what authority had the master to sell ... a ship all over the world ... they would have said ... the law of our own country must be primarily looked for." Compare this with *Bridgeman's case* (1614), *supra* note 184. Cf. also *Freeman v. The East India Co.*, 5 B. & Old. 616, 106 Eng. Rep. 1316 (1822)—cargo sent from India to England on board English vessel, sold by master of ship in Cape of Good Hope, without absolute necessity, trover for cargo in England—held, on authority of *Johnson v. Shippin*, *supra* note 368 (which held that master has authority only to hypothecate, and not to sell, ship, and that sale transferred no property), that purchaser did not acquire title. "The law of Holland ... was stated to be the same as the law of England" (624, 1319).

Contrast *Eliza Cornish case* with *Cammell v. Sewell*, 5 H. & N. 727, 157 Eng. Rep. 137 (1860), *infra* notes 381 and 382.

Cf. also *The Bonaparte*, 3 W. Rob. 297, 166 Eng. Rep. 973 (1850)—bond of bottomry upon ship and cargo granted by master in Sweden, invalid by law of Sweden—upheld, because (*per* Dr. Lushington, 306, 976) "the validity of the bond must be determined upon the general maritime law, and not by the municipal law of the country where it was granted, so far at least as any question arises upon the obligatory effect of the bond on persons not being Swedish subjects." To the same effect *Duranty v. Hart, Cargo ex The Hamburg*, 2 Moore N.S. 290, 15 Eng. Rep. 911 (1863), *Hamburg vessel—bottomry bond in Island of St. Thomas—per* Dr. Lushington, at 297, 914: "I must take as my guide the ordinary Maritime Law."

³⁷⁷ Cf. the *Gaetano and Maria*, L. R. 7 P. D. 137, 143 (1882), *per* Brett, L. J.: "The law which is administered by the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament, or by reiterated decisions and traditions and principles had adopted as the English maritime law."

22 & 23 Vict., c. 6 (1859), opened the admiralty court to all serjeants and barristers at law, and all attorneys and solicitors. By the SUPREME COURT OF JUDICATURE ACTS, 36 & 37 Vict., c. 66 (1873), and 37 & 38 Vict., c. 83 (1874), the High Court of Admiralty was consolidated with the superior courts of common law at Westminster, the Court of Chancery, the Court of Probate, and the Divorce Court.

³⁷⁸ 3 & 4 Vict., c. 65 (1840); 13 & 14 Vict., c. 26 (1850); 24 Vict., c. 10 (1861); 33 & 34 Vict., c. 90 (1870). These Acts restored admiralty to the ancient position of court of record, gave jurisdiction to admiralty in civil matters of maritime character arising in the body of a county, and, also, generally, in matters of salvage, bottomry, damage, towage, goods supplied to foreign ships, building, equipping and repairing ships, disputes between co-owners. *Cf.* also the Merchant Shipping Acts, 17 & 18 Vict., c. 104 (1854); 18 & 19 Vict., c. 91 (1855); 25 & 26 Vict., c. 63 (1862).

After the decision in the *Ida* case (1860), *supra* note 375, the ADMIRALTY COURT ACT, 24 Vict., c. 10 (1861), "to extend the jurisdiction and improve the practice of the High Court of Admiralty," gave to the court jurisdiction (§ 7) "over any claim for damage done by any ship." The *Diana*, Lush. 538, 167 Eng. Rep. 243 (1862), and *The Courier*, Lush. 541, 167 Eng. Rep. 244 (1862), held that the court has jurisdiction in a cause of collision in foreign inland waters, between British ships, respectively between foreign vessels.

³⁷⁹ *Cf.* The *Gaetano and Maria* (1882), *supra* note 377.

³⁸⁰ *Cf.* already *Power v. Whitmore*, 4 M. & S. 139, 105 Eng. Rep. 787 (1815)—insurance of goods made in England; these goods by decree of Court in Lisbon were obliged to pay contribution to general average, which by the law of England could not have been demanded; suit against the underwriter—held, *per* Lord Ellenborough, C.J., at 151, 791: "The general average to which alone their indemnity is confined, is general average as it is understood in England, where this contract of indemnity was formed."

Cf. The *Johann & Siegmund*, Niegél, *supra* note 375; *Cammell v. Sewell*, *supra* note 376.

³⁸¹ *Supra* note 376.

³⁸² *Crompton, J.*, said, at 744, 1378: "If . . . [the *Eliza Cornish* case, *supra* note 376] be an authority for the proposition that *lex loci contractus* and *lex rei sitae* be disregarded, we cannot agree with the decision. . . ." Byler, J., dissented, on authority of the *Eliza Cornish* case, and because there was no judgment *in rem* in Norway, in which case the title under Norway's law would have been valid. *Cf.*, in that regard, *supra* notes 292 *et seq.*

Cf. also *Lloyd v. Guibert*, [1865] 1 Q.B. 115—loan on bottomry bond upon ship, freight and cargo; ship was French, bottomry bond made in Portuguese colony; ship and freight being insufficient, deficiency fell on cargo; owner of cargo sought to be indemnified against French shipowners—held, French law governed and suit dismissed. Said Willes, J., at 124: "... there is no general uniform rule in maritime law upon the subject [of limitation of liability of shipowners]. . . Any general, much more any universal maritime law, (125) . . . is easier longed for than found."

³⁸³ The *Laurel*, Br. & L. 191, 167 Eng. Rep. 330 (1863), where Dr. Lushington held that existence of a foreign "local" law, creating lien on ship and freight for advances in a foreign port, may be pleaded as material evidence to support allegation that agreement was to make advances on credit of ship and freight.

³⁸⁴ The *Bahia*, Br. & L. 287, 167 Eng. Rep. 368 (1864)—contract between master of a French vessel and shipper made in New York, for transportation to France—held, relations of shipowner, master, and underwriters were all governed by French law.

³⁸⁵ Said Dr. Lushington, in *The Bahia*, *supra* note 384, at 305, 376: "It was said that . . . the *lex fori*, which has to adjudicate upon this alleged wrong, is British law.

... I cannot hold that British law is applicable to this case; and I think that a British court, having to adjudicate with respect to the contract, should adopt the foreign law which had from the beginning been contemplated as binding between the contracting parties."

Let it be noted that what was discarded in these cases was only the idea of *exclusive* administration by the admiralty of "the general maritime law"; that law continued, however, to be recognized as one which, in proper cases, would be administered in the admiralty. Cf. *The Leon*, 6 Prob. Div. 148 (1881)—collision of British and Spanish ships, the last being in fault; by Spanish law owners of vessel not liable for negligence in navigation by master and crew—held, "the general maritime law as understood and administered in England" governs, by which law owners were held responsible.

³⁸⁶ *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Bater v. Bater*, [1906] Prob. 209.

³⁸⁷ Originally divorce *a mensa et toro* (divorce *a vinculo matrimonii* not being recognized by the Church at all) was subject to the exclusive jurisdiction of the ecclesiastical courts and was universally governed by the *jus commune* of the Church. Courts of bishops acknowledged each other and were recognized by the secular power in respective countries. Their decisions were subject to appeal to the pope. After Reformation the English law and jurisdiction of divorce became separate and national, but continued to be ecclesiastical in character. Episcopal courts administered, of course, exclusively their own law. Divorces *a vinculo* came to be granted by private acts of Parliament. The law and jurisdiction of divorce were secularized only by 20 & 21 Vict. c. 85 (1857). But the old principle of "complete dependence of the cause for divorce on the *lex fori*" was preserved. "The extent to which the rules of Private International Law in England fall short of receiving universal assent is perhaps more remarkable in the matter of divorce than in any other part of our subject." WESTLAKE, *PRIVATE INTERNATIONAL LAW* (7th ed. 1925) 97, 100.

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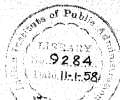
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ONE THOUSAND COPIES WERE PRINTED
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787

George Grady Press • New York